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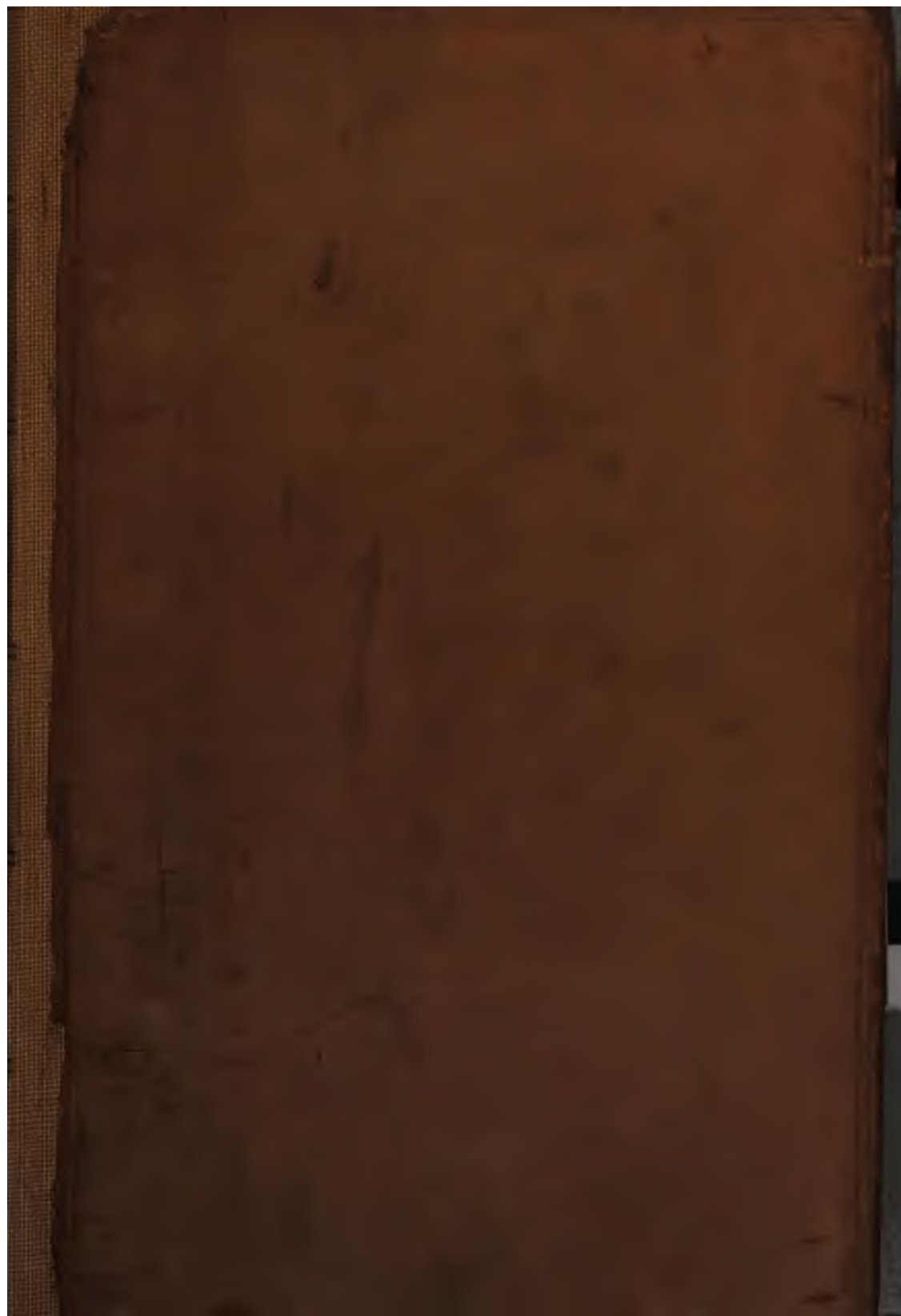
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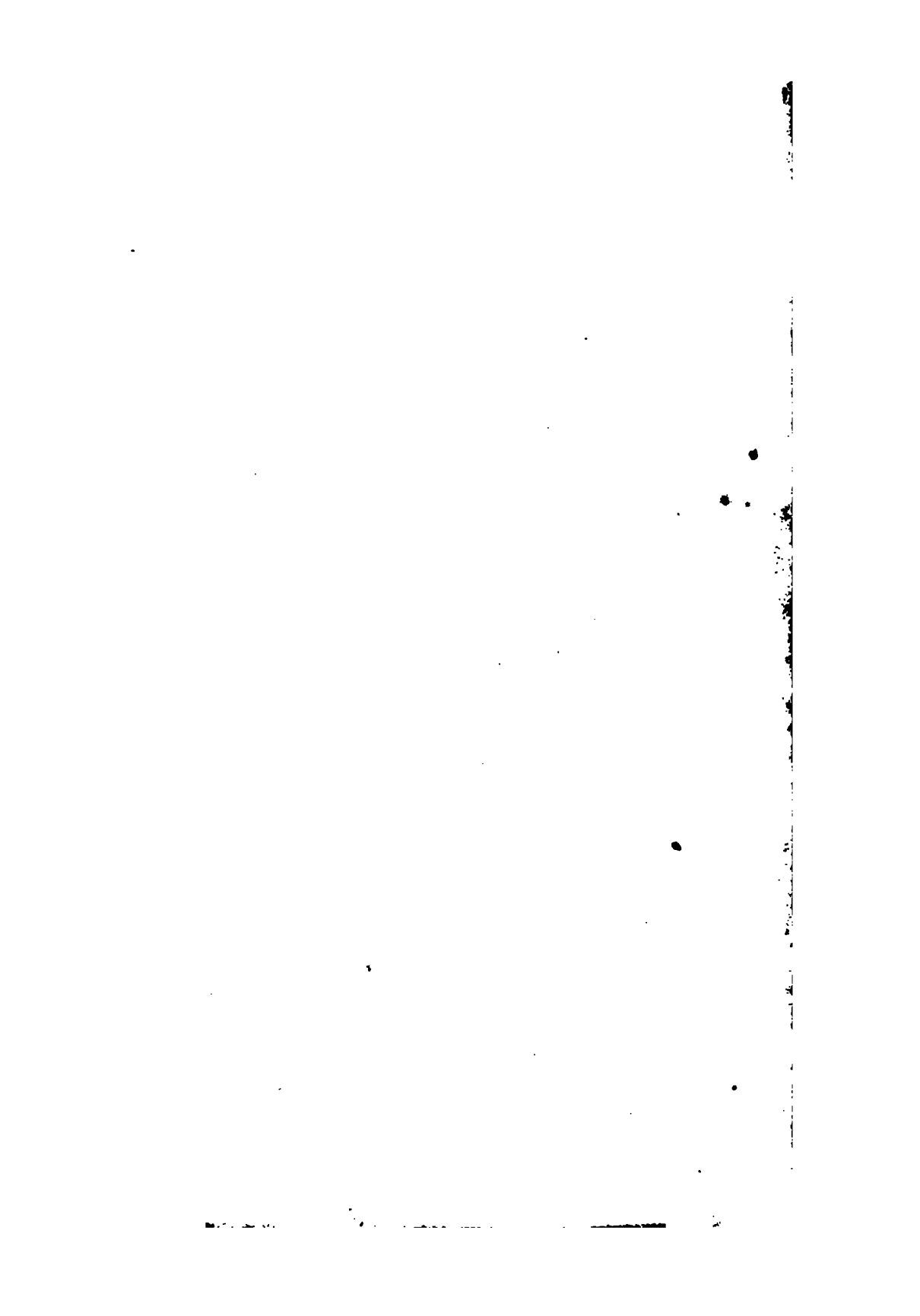
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# REPORTS OF CASES

RELATING TO THE

## Duty and Office of Magistrates

DETERMINED IN THE

*COURT OF KING'S BENCH,*

AND

OTHER COURTS,

FROM

MILARY TERM, 1835, TO TRINITY TERM, 1836, BOTH INCLUSIVE

BY

SANDFORD NEVILE, Esq. OF THE INNER TEMPLE,

AND

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BARRISTERS AT LAW.

VOL. III.



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A

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C A S E S

IN THE

COURT OF KING'S BENCH,

FOR THE USE OF

**Justices of the Peace.**

HILARY AND EASTER TERMS, 1835.

The KING v. The Inhabitants of St. NICHOLAS,  
COLCHESTER.

UPON appeal against an order for the removal of *Sanders Sparrow*, his wife and family, from *St. James* to *St. Nicholas, Colchester*, the sessions confirmed the order, subject to the following case:—

By an agreement in writing, dated 24th March, 1831, the pauper and one *Hutchinson* hired a messuage in the parish of *St. Nicholas*, for two years, at the rent of 60*l.*, payable half yearly. *Hutchinson* was included in the agreement merely to guarantee the payment of the rent—the pauper only being intended to occupy the premises.

however short a period such occupation may continue, and however small may be the sum paid in consideration of it.

*Seemle*, that a letting of rooms by an inn-keeper to his guests, is not such an underletting as would defeat the settlement.

The 1st section of 1 *W. 4*, c. 18, (though prospective only) applies to cases in which the occupation had commenced, but was not complete, at the time of passing of the act.

*Seemle*, That a discharge of rent, by means of a distress upon the goods of the tenant, is a sufficient payment of rent by the party hiring the tenement, within 1 *W. 4*, c. 18, s. 1.

1835.

No settlement can be gained since the passing of 1 *W. 4*, c. 18, by the renting and occupation of a tenement by a party who allows an under-tenant to have the exclusive occupation of rooms in the tenement,—for

1835.

The KING  
v.  
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COLCHESTER.

25th March, the keys were delivered to the pauper.

7th November, a distress was put in for the half-year's rent which had become due at Michaelmas, 1831, and the pauper's goods were sold under the distress by the bailiff, who, out of the proceeds, paid 30*l.* for the rent to the landlord who had employed him, and paid over the remainder, after deducting the costs of the distress, to the pauper.

At Lady-day, 1832, the pauper gave up possession, in pursuance of an agreement made with *Hutchinson*, under which the latter took exclusively upon him the liability to pay the arrear of rent due from the pauper.

During the year commencing Lady-day, 1831, and expiring Lady-day, 1832, three rooms in the said messuage were underlet by the pauper to Mr. *D. W. Harvey*, who had the exclusive occupation of them for three weeks, for which he paid 8*l.* The question is, whether the pauper gained a settlement in *St. Nicholas* or not. If he did, the order of sessions is to be confirmed,—if not, the order to be quashed.

*Ryland*, in support of the order of sessions. It was contended at the sessions, that the pauper did not gain a settlement in *St. Nicholas*, for two reasons:—first, because the rent was discharged by means of a *distress*, and not by actual payment *by the pauper*; and, secondly, because the pauper had, during the time of his occupation under the hiring, *underlet* three rooms of the demised messuage. It is certainly required by 1 *W.* 4, c. 18, s. 1, that the tenement shall be actually occupied, and the rent *paid by the person hiring the tenement*. This case, however, is not within the operation of the statute; for the tenancy commenced on the 25th of March, 1831, whereas the act in question did not come into operation until the 30th of the same month; and

First point:  
Where 1 *W.* 4,  
c. 18, s. 1,  
applies.

*Rex v. Ruthin* (a) decided that the first section of 1 W. 4, c. 18, which contains the provision alluded to, is not retrospective. The only distinction between this case and *Rex v. Ruthin* is, that in the latter case the right to the settlement was *complete* before the act passed, whereas in this case it was *inchoate* only. But that inchoate right could not be affected by a provision which is prospective only. Assuming, however, that the act of 1 W. 4 does apply, it is submitted that the payment in this case was a sufficient payment *by the person hiring* the tenement; for, although it is not actually paid by the tenant, it is paid out of the proceeds of his goods. [Lord Denman, C. J. It can scarcely be contended, that payment by distress is not payment by the party.] It was held in *Rex v. Carshalton* (b), that a discharge by distress *after the death* of the pauper, did not satisfy the statute; but it was admitted in the course of the argument, that if the distress had been made *before* the pauper's death, the statute would have been complied with. As to the second point:—This case is in some respects distinguishable from *Rex v. St. Nicholas, Rochester* (c). There the pauper underlet two-thirds of the house *by the quarter*, at the rate of 22*l.* per annum, the whole rent being 40*l.*; and the undertenant, for two quarters, occupied and lived in the tenement. Here, the underletting is of three rooms, for the short space of *three weeks* only; the party does not appear to have slept on the premises; and the sum paid for such occupation was no more than 8*l.* But, assuming that this case is similar to *Rex v. St. Nicholas, Rochester*, it is hoped that the Court will review their decision in that case, and overrule it, if upon consideration they

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The King  
v.Inhabitants of  
St. Nicholas,  
Colchester.Second point:  
Payment of  
rent by dis-  
tress.Third point:  
Underletting.

(a) *Ante*, vol. i. 139; 5 Barn. & Ryl. Mag. Ca. 249.  
& Adol. 215.

(c) *Ante*, vol. ii. 1; 5 Barn.

(b) 9 Dowl. & Ryl. 132; 6 & Adol. 219.

Barnw. & Cressw. 93; 4 Dowl.

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should think it wrong. That decision goes to this extent; that no man, who underlets a single room for a single night during the year of his occupation, will gain a settlement by renting a tenement, however large may be the amount of rent which he pays. Upon this branch of the case, the argument which was offered to the Court in *Rex v. St. Nicholas, Rochester*, may, with the permission of the Court, be prayed in aid. [Lord Denman, C. J. We were ourselves startled at the consequences of the conclusion at which, nevertheless, we felt ourselves bound to arrive.] If the Court should decide that in this case no settlement was gained, it might be contended, that an occupation (in other respects good), by a master, would be rendered ineffectual for the purposes of settlement, if he agreed with his servant that, in consideration of a reduction of wages, the latter should have a room in the house set apart for his exclusive use. All tavern-keepers, hotel-keepers, and lodging-house keepers, would, in like manner, be prevented from gaining a settlement. For if an underletting for three weeks would prevent a party from gaining a settlement, so would an underletting for three nights, or a shorter period.

First point.

*Knox*, contra. The act of 1 Will. 4, c. 18, applies to this case. In *Rex v. St. Mary-le-bone* (a) it was held, that 59 Geo. 3, c. 50, by which an occupation of the tenement for twelve months was made necessary, applied to a person whose settlement was inchoate before the passing of the act. In that case the pauper hired a tenement of more than 10*l.* a-year value, and resided therein more than forty days altogether, but for only thirty-eight days before 59 Geo. 3, c. 50, came into operation; and the Court held that the pauper had gained

(a) 4 Barn. & Alders. 681.



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tenant, but of the landlord. On the contrary, he acts against the will of the tenant. Therefore it is submitted, there was no sufficient *payment*, as well as no sufficient occupation to confer a settlement.

Lord DENMAN, C. J.—This is in truth a question whether *Rex v. St. Nicholas, Rochester*, was well decided; for the attempt which has been made to distinguish that case from the present, appears to me to fail. *Rex v. St. Nicholas, Rochester*, was decided after full argument, and upon great consideration, by my brothers and myself. At the same time, if there had been any thing like a reasonable doubt raised as to the law having been improperly applied on that occasion, I am quite sure every one of us would have been willing to give the greatest attention to every argument that could be brought to shew us that we were wrong. I recollect that upon the former occasion every judge who gave an opinion felt that the consequences were such as the legislature had not contemplated, and such as might involve some inconveniences. But we found the words of the statute too strong to grapple with. I am ready to declare that where I find the words of a statute perfectly clear I shall adhere to those words, and shall not allow myself to be diverted from the application of them by any supposed consequences of one kind or the other—as to which courts of justice are very often much deceived. The words of the statute (which came into operation on the 30th of March) are these: “that from and after the passing of this act no person shall acquire a settlement in any parish or township maintaining its own poor, by or by reason of such yearly hiring of a dwelling-house or building, or of land, or of both, as in the said (recited) act expressed, unless such house or building or land shall be *actually* occupied under such



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the act of parliament. Then the only question is, whether, the year having commenced prior to the passing of the act, the inchoate settlement can be affected by it? Now it appears to me that the words of the act being "that no settlement shall be gained from and after the passing of the act," which was the 30th of March, it clearly does apply to this case.

WILLIAMS, J.—I am of the same opinion. One of the reasons which induces me to abide by the decision in *Rex v. St. Nicholas, Rochester*, is, that I am quite satisfied of the truth of that which has been often said by learned judges, who have very well understood this subject, that it is as important, especially in cases of this sort, to abide by the rule of law when ascertained, as it is to determine the rule originally. Unless, therefore, I saw the clearest ground for doubting the correctness of the decision in *Rex v. St. Nicholas, Rochester*, I should certainly give my assent to that decision. It appears to me that it is perfectly consistent with the principles and objects of the acts which have been passed upon this subject. The 6 *Geo.* 4, c. 57, was introduced in consequence of the very expensive litigation occasioned by the then state of the law; and, in order to remedy this evil, that act confined the legal settlement by renting a tenement, by enacting that no person should acquire a settlement in any parish &c., by or by reason of settling upon, renting, or paying parochial rates for, any tenement not being his own property, unless such tenement should consist of a separate and distinct dwelling-house or building, or of land, or of both, *bonâ fide* rented by such person in such parish &c., at 10*l.* a year for one whole year; nor unless such house &c. should be *occupied* under such yearly hiring, and the rent for the same to the amount of 10*l.* actually paid, for one

whole year at the least. That at once got rid of much of the vexatious litigation which arose on the subject. After that act came the one upon which this question depends, (1 Will. 4, c. 18,) which is expressly stated to be "An act to explain and amend an act of the sixth of his late majesty, as far as regards the settlement of the poor by the renting and occupation of tenements." Now in what respect does it explain and amend it? It explains and amends it by still further abridging and curtailing the power of gaining settlements by renting a tenement, in conformity with the principles of the former act; and it accordingly says, that "no settlement shall be gained unless the house &c. shall be *actually* occupied under such yearly hiring *by the person hiring the same* for the term of one whole year at the least." It appears to me that the construction which was put upon those words by the Court in *Rex v. St. Nicholas, Rochester*, is the true and right construction. It has been said that this act ought not to have a retrospective operation. It is observable that the act does not affect the *contract*, but relates expressly to the *occupation*. It declares that after the passing of that act no settlement shall be gained unless an occupation of a particular sort shall take place. If the act had required a *contract* of a specific nature, an inchoate settlement by reason of an occupation under a contract valid at the time when it was made, would not have been affected by this. This case is, however, totally different. I therefore am of opinion, that those words "*actually occupied &c.*," which are studiously introduced into this statute, must point to an entire exclusive occupation; and if it does, we cannot enter into the question of degree—whether the underletting be of 10*l.* a year, or 5*l.*, or 50*s.* If there be a clear underletting by the party of any portion of the house, for however short a period of time, and for however small a

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Order of Sessions quashed.

*The KING v. The Inhabitants of the Township of*  
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It is not necessary, in order to create a statutory exemption from poor-rates, that

**UPON** appeal by "The Company of Proprietors of the Navigation of the River Dun," a rate for the relief of the poor of the township of Barnby Dun, in the West

the act should in express terms exempt from such particular rates; but it is sufficient if, by fair construction of the words of the act, the exemption clearly appears.

Therefore, where in a local act (by which a company are empowered to make the river D. navigable, and to make new cuts through the adjoining lands,) it is enacted, that the company "shall not be taxed or assessed for the navigation, or the profits thereof, at any place except the towns of A. and B.," where account books are directed to be kept:—the Court held, that an exemption from poor-rates in respect of lands taken for the purpose of the act, elsewhere than in A. or B., was created; and this although no part of the navigation is within the town of A.

And where by a subsequent local act, after reciting that it would be advantageous to abandon the existing navigation in certain parts, and to make new cuts in lieu thereof, and empowering the company to make certain new cuts, and to receive additional tolls in consequence thereof, it was enacted, that the cuts should, when made, be considered and taken as part of the navigation of the river D., and that all the provisoes, directions, restrictions, penalties, and forfeitures, in and by the former acts, respecting the boatmen employed on the said river, the owners, commanders &c., of boats &c., or other persons employed thereon, or passing the locks of the said river, or making obstructions thereon, or in any other respect relating to or for the benefit or protection of the said navigation, and all other powers and authorities therein contained, should extend and be applicable to the said cuts &c., as fully in every respect as if the said cuts &c. had originally been part of the river D. navigation, and had been inserted in the several acts:—Held, that the company were exempt from poor-rates in respect of land, not in A. or B., taken by them under the powers of this act, and used for cuts in lieu of parts of the old navigation.

The words, "shall, when made, be considered and taken as part of the navigation of the river D." are alone sufficient to extend to the new cuts the exemption from assessment which had previously existed in respect of the navigation generally.

Riding of Yorkshire, was quashed, subject to the opinion of this Court upon the following case:—

The river Dun navigation commences in Tinsley, two miles east of Sheffield, and proceeds in an easterly direction down the course of the river Dun to Holmstile in Doncaster, and thence in an easterly direction, through the township of Barnby Dun, to Fishlock Ferry, whence it communicates with the river Ouse.

By 12 Geo. 1, c. 38, "for making the river Dun navigable from Holmstile in Doncaster, to Tinsley, a township near Sheffield," certain persons were appointed undertakers of the navigation, and were empowered to make the river navigable from Holmstile to Tinsley, to make new cuts through the adjoining lands, and to receive certain rates and duties of tonnage.

By 13 Geo. 1, c. 20, "for improving the navigation of the river Dun from Holmstile to Wilsick House, in the parish of Barnby Dun," similar powers are given to certain other persons as to this part of the river.

By 6 Geo. 2, c. 9, the two navigation companies are united into one by the name of "The Company of Proprietors of the Navigation of the River Dun," and all powers given to the separate navigation companies are vested in the united company. In this act is the following clause:—"And be it further enacted, that the said company of proprietors, their successors or assigns, or any of them, *shall not be taxed or assessed for the same, or the profits thereof, at any place or places except Sheffield or Doncaster aforesaid;*"—at which places it was further provided that books of accounts should be kept.

Under 13 Geo. 2, c. 11, "for improving the navigation of the River Dun from Wilsick House, in the parish of Barnby Dun, to Fishlock Ferry," the navigation was continued to its present eastern extremity, and the

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Stainforth Cut (176 yards of which are in Barnby Dun) was made.

By 2 *Geo. 4*, c. xlv., reciting that it would be advantageous to abandon the existing navigation in certain parts, and to make and maintain other cuts or canals in lieu thereof, the company are empowered to make certain cuts or canals, with proper towing paths, and, among others, a cut or canal from the lower end of an existing cut at Barnby Dun, to the upper end of Stainforth Cut: And in consideration of the expenses of making such cuts &c., the company were authorized to demand and receive certain rates and duties over and above all other rates and duties allowed to be taken by the former acts: And it was enacted, "that the intended cuts or canals, alterations and works, should be considered and taken as part of the navigation of the river Dun, and that all and every the provisoes, directions, restrictions, penalties, and forfeitures, in and by the thereinbefore recited acts (*viz.* the acts above-mentioned) and every of them, respecting the boatmen employed on the said river, the owners, commanders, masters, or rulers of boats, keels, or vessels, or other persons employed thereon, or passing the locks of the said river, or making obstructions thereon, or in any other respect relating thereto, or for the benefit or protection of the said navigation, and all other *powers and authorities* therein contained, should extend and be applicable to the said cuts &c., as fully in every respect as if the said cuts &c. had originally been part of the river Dun navigation, and had been inserted in the several acts." Under this act, the new cut in Barnby Dun was completed in 1830.

The navigation company is thus rated in the rate appealed against, the rate being at one shilling in the pound upon a sum of 173*l.* 5*s.*:—"The river Dun

Company's new cut or canal, land covered with water, basins, towing paths, locks and tolls, and other works."

No objection is made by the appellants to the amount at which they are rated, and indeed it is admitted that the rate is fair, supposing that the company are liable to be rated at all. The township of Barnby Dun is co-extensive with the parish. The navigation through the township consists entirely of land, the length of the several parts of it being as follows:—The old cut 308 yards, the new cut 3498 yards, part of Stainforth Cut 176 yards, total in Barnby Dun 3982 yards, nearly  $2\frac{1}{4}$  miles.

The bed of the river is not used as a navigation. Previous to the completion of the new cut the company had been rated, and had paid rates in Barnby Dun upon a sum of 66*l.* 5*s.*

Upon the completion of the new cut, the company were rated upon 173*l.* 5*s.*, upon which assessment they have paid one rate. The company also, in December, 1831, paid a highway composition in Barnby Dun upon the same assessment. Land was purchased by the company for making the new canal in Barnby Dun. The company is rated, by mutual agreement, in the adjoining township of Kirk Sandal, upon 90*l.* It is also rated in the adjoining township of Stainforth and in other townships. It is not rated in Sheffield;—indeed no part of this navigation is in the township of Sheffield; neither is it rated in the township of Tinsley, where it terminates. It is rated in the township of Doncaster upon 247*l.* 10*s.*

The entire length of the navigation of the river is 30 miles, of which length at least 12 miles are canals or cuts.

The questions for the consideration of the Court are, first, whether the company is liable to be rated in the township of Barnby Dun at all; and, secondly, if so

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liable, upon what sum, or in what manner, ought it to be rated in that township?

*Pollock, A. G.*, in support of the order of sessions. The company is not liable to be rated at all; and as it is admitted that, if liable to be rated, they are not excessively rated, it is a mere matter of curiosity to inquire *how* they ought to be rated. Therefore the first-only of the two questions submitted need be discussed. By 6 Geo. 2, it is enacted that the company shall not be *taxed or assessed* for the navigation, or the profits thereof, at any place except Sheffield or Doncaster; and therefore the only questions are, does the exemption extend to *poor rates*? and, if so, does it apply to the new works made under the authority of the act of 2 Geo. 4?

As to the first question, *Rex v. London Gas Company* (a) shews that the expression "shall not be taxed or assessed" &c., exempts from the payment of poor-rates.

Then as to the second question. By 2 Geo. 4, it is enacted, that the new cuts shall be considered and taken *as part of the navigation of the river Dun*; which is tantamount to saying (amongst other things) that the new cuts are to be subject to no other liability than the navigation of the river Dun had previously been subject to. [Lord Denman, C. J. The clause goes on to provide that all the powers and authorities in the former acts shall be applicable to the new cuts as fully as if the new cuts had been originally part of the river Dun navigation, and had been inserted in the former acts.] It is evidently intended that the new works shall be considered as if they had been a part of the original navigation.

The Court (stopping Sir J. Campbell and Milner) called upon the opposite counsel.

(a) 2 Mann. & Ryl. 12; 8 Barn. & Cressw. 54; 1 Mann. & Ryl. Mag. Ca. 263.

*Follett*, S. G., *contra*. The question is, whether the parishes in which the new cuts have been made under the authority of 2 *Geo.* 4, are to be deprived of the right previously possessed of rating the lands used for these new cuts. The parishes have this right unless there be some clear exemption. In construing acts of this description the principle invariably adopted is, that to exempt the company from a burthen, and to deprive other parties of a benefit, the words made use of must be clear and unambiguous. By the statute of 18 *Eliz.*, all land is made ratable to the relief of the poor, and therefore exemption must be clearly made out. This clause can, upon examination, scarcely be deemed to create an exemption. The act was passed when the law was supposed to be different from what it is,—when *tolls* were supposed to be ratable; and it may fairly be taken that the legislature intended by the clause merely to exempt the company from a supposed liability to be rated for the *tolls*, and not to relieve the *land* from the burthen which it previously bore in common with all other land. If the old works are not exempt, of course then the new works are not so.

But supposing the old works to be exempt from poor-rates—the exemption is confined to those old works. Previously to the passing of the 2 *Geo.* 4, there were several acts in existence. In those acts penalties were imposed on persons doing damage to or obstructing the navigation, and regulations were made as to the passage of the boats on the canal, and as to the masters &c. of the boats. With a view to extend the same right of control over the new cuts, it was, in 2 *Geo.* 4, enacted, that the intended cuts should be considered and taken as part of the river Dun, and that all the provisoes, directions, penalties, and forfeitures by the former acts respecting the boatmen employed on the river, the own-

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ers, commanders, masters, or rulers of boats, keels, or vessels, or other persons employed thereon &c., and all other *powers and authorities* therein contained, should extend and be applicable to the new cuts &c., as fully in every respect as if the said cuts &c. had been originally part of the river Dun navigation &c. If the legislature had intended the *exemptions* to be applicable to the new cuts, the word "*exemptions*" might easily have been used in addition to those of "*powers and authorities*." *Rex v. The Birmingham Canal Company* (a) is very similar to this case. The whole of Lord *Tenterden's* judgment in that case is closely applicable.

The Court then called upon the counsel for the company to support the order of sessions.

Sir *J. Campbell* and *Milner*. The first point to be ascertained is, whether the navigation was exempt from ratability under the act of 6 Geo. 2, which enacts "that the said company of proprietors shall not be taxed or assessed *for the same or the profits thereof*." It is true that the words "the same" cannot be referred to any express antecedent, but upon looking at the whole of the preceding enactments, it is evident that the words refer to the whole of the old navigation. Therefore by this clause the old navigation, and *also* the profits thereof, (i. e. *the tolls*) are exempt from the liability to be rated to the relief of the poor. The old act having thus completely exempted the old navigation, the legislature may well be supposed to have intended that the new cuts to be *substituted* for parts of the old navigation should in like manner be exempt. This consideration establishes a distinction between this case and that of *Rex v. The Birmingham Canal Company*, for there the

(a) 2 Barn. & Alders. 578.

parishes had a vested right to rate the land, and the works for which that land was used were not substituted for other works which had been previously exempted. In *Rex v. The London Gas Light Company* it was observed by Lord Tenterden, that the embankment sought to be rated might be beneficial in a peculiar manner to the parish. The navigation in this case may be highly beneficial to the parish, which, therefore, receives some consideration in return for its being deprived of the right to rate the land.

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*Follett, S. G., and Dundas, contra.* The clause in the act of 6 Geo. 2, was only intended to apply to something which the legislature thought the company would be ratable for, viz. the tolls, which were then supposed to be ratable per se, although the river navigation could never have been of itself ratable. The Company may, under the act of 2 Geo. 4, take land which was previously ratable and use it for cuts; and if the land is then to become exempt from ratability, the parish is deprived of a vested right which they previously possessed. The principal words here used in the clause in 2 Geo. 4, which is supposed to extend the exemption, are "powers and authorities,"—words inadequate to constitute an *exemption*. Even if the word "*exemption*" had been actually inserted, it would have been insufficient if the context made the clause ambiguous. There are no words of positive exemption. The clause which is said to exempt the company is a mere police regulation. In *Rex v. The Birmingham Gas Company*, *Best, J.* says, "it is impossible to suppose that the legislature could have intended to grant them (the company) this exemption, without having distinctly stated such to have been their intention." If it has required all this argument to shew what was the intention of the

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legislature, the question cannot be free from doubt, and this is sufficient to preserve the vested right of the parish. Under the 13 *Geo.* 2, the Stainforth Cut was made, and there is nothing in that act which can be construed into an exempting clause. This shews that if it was intended by the legislature to exempt all the works from ratability, they have not adhered constantly to that intention.

LORD DENMAN, C. J.—I confess that a good deal of doubt has existed in my mind in the course of this argument. I am so very unwilling that any of these cases should be decided on general views of utility, which may vary in every Court before which cases happen to come, that I am extremely anxious to see how the *words* of the statute will decide the case; and I think, that the words of this statute are sufficient to decide that this company is exempt from the payment of rates in respect of the land in question, which land was taken under the powers of the act of 2 *Geo.* 4.

It is true that words could hardly be less pertinent for the purposes which they really meant to carry into effect, than those employed in the first section of 6 *Geo.* 2, giving the exemption itself. They say, "That the company of proprietors, their successors or assigns, or any of them, shall not be taxed or assessed for the same, or the profits thereof, at any place or places, except Sheffield or Doncaster aforesaid," (those places at which the accounts were to be made up; but I think I cannot in any way connect the ratability with the mere making up of the accounts.) It seems to me, that though there are no words immediately preceding that clause, which can be properly referred to by the words "same or the profits thereof," yet we are bound to suppose the legislature must have meant by the word "same," such of

the before-mentioned articles as were capable of producing profits that might be rated. In that sense we must hold that the words "taxed or assessed for the same" refers to the *navigation* which was regulated by this act of parliament.

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Then the question is, whether the exemption so given is extended by 2 Geo. 4 to those lands which the company is enabled to take for the purposes of that act? The object of that act is to enable the company to "abandon the existing navigation in certain parts, and to make other cuts in lieu thereof;" and the company are empowered to make such cuts, with proper towing paths and so forth, and among others the cut in question. Then in consideration of the expense the company shall be at in making the new cuts &c., they are allowed to take certain additional rates and duties; and then it is further enacted, that the intended cuts and canals, alterations and works, shall be considered and taken *as part of the navigation of the river Dun*. Then there are other words, as to the effect of which I think very considerable doubt may be entertained. These first words, however, appear to me to be sufficient to establish the right of the company to exemption in respect of their newly-acquired lands, just in the same way as if they had possessed them under the act containing the original exemption clause. For, when it is said "that the said intended cuts &c. shall be considered and taken as part of the navigation of the river Dun," we are then bound to say, that these cuts, being a part of the navigation of the river, the privileges of exemption, which the company possessed in respect of the original works, are conferred upon them in respect of those which are substituted.

[The Solicitor-General suggested, that there were parts of the navigation made between 6 Geo. 2, and

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2 Geo. 4, which were admitted not to be exempt, and which had always been rated.]

At present the question is confined to the lands that were taken under 2 Geo. 4, and I am proceeding on the principle that those lands are distinctly substituted for, and put in the same situation as the lands that were exempted under the original statute.

It seems to me, therefore, that the sessions have done right in quashing the rate, and that we must confirm their order.

LITLEDAL, J.—I am of the same opinion. It seems to me that the original exemption in 6 Geo. 2, is sufficiently extensive to exempt this land from poor-rates, except so far as they are to be taken in Sheffield and Doncaster. It seems to be admitted, that the words, “taxed or assessed,” are sufficient to exempt from poor-rates, as was decided in *Rex v. London Gas Light Company*. If that be so, the question is as to the construction of 2 Geo. 4, which authorises the company to abandon certain parts of the existing navigation, and to make new cuts, &c., in lieu thereof. It appears to me, that as this cut was merely a substitution for what was before exempted, it ought to be governed by the same rules, and subject to the same exemptions. I do not mean to say that this would be so, if there were no clause in 2 Geo. 4 enacting that the intended cuts &c. should be considered and taken as part of the navigation of the river Dun, &c. It is admitted that this clause does not in express words confer any exemption, but the question is, whether the effect of the whole of those words taken together, though the particular word is not used, does not give an exemption? It seems to me, that it gives exactly the same exemption as the previous

statute gave as to the original works. Though, generally speaking, where the parish are entitled to rate any portion of land, that right is not taken away, unless there be some express reason for it, I do not apprehend that it is necessary to use in distinct terms the word "exemption." If, upon a fair construction of the act, the exemption appears, the right of the parish to rate the particular land is effectually taken away, though the word "exemption" be not used. It seems to me, therefore, that as this cut is a substitution for the bed of the river, it is governed by the same rules as the original navigation,—and that the company are exempt.

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WILLIAMS, J.—I am entirely of the same opinion. I agree that it is not desirable in these cases to attempt to lay down any general rules, because the question must depend upon the language of the acts of parliament in each case. It is undoubtedly true, that it is incumbent on the appellants to shew that by some express clause they are protected from ratability; otherwise it would follow as a matter of course that the statutory liability would be imposed upon them, and they would be subject to be rated for this cut. Therefore, the matter comes to this single question, whether the two acts of parliament taken together do constitute that exemption?

The words, "the same, and the profits thereof," which are found in the clause of 6 *Geo.* 2, can with no propriety be referred to any thing but the navigation. This clause must, in my opinion, be understood as constituting an exemption from being assessed to the poor-rates in the township of Barnby Dun.

Then comes the second question, namely, Whether the new works, made under 2 *Geo.* 4, are in like manner exempt? and I own, if the question had stood upon

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those general words, "provisoos, directions, instructions, penalties, forfeitures," &c., there not being introduced into the clause the word "exemption," I should have had great difficulty in saying that these words touched the question of exemption from taxes or assessments. But it seems to me to be quite clear, from the other words which have been referred to, that the intended cuts, &c., did, when they were made, become identical with the original navigation of the river Dun. This consideration disposes of the question; and I am of opinion, that as the original navigation was exempt, so also are the substituted cuts and canals.

Order of Sessions confirmed.

**The KING v. The Inhabitants of WITNESHAM.**

A person in-rolled as a member of a volunteer corps is not *sui juris* so as to be able to make a valid contract of service for a year.

It is not necessary in order to make a man in-rolled as a volunteer, an effective member of his corps, that he should have taken the oath of allegiance required by the volunteer act—

ON appeal against an order for the removal of *Robert Copping*, his wife and children, from the parish of Swil-land, in Hampshire, to the parish of Witnesham, in Suffolk, the sessions confirmed the order, subject to the opinion of this Court upon the following case:—

The respondents having established a settlement of the pauper in the appellant parish, the appellants proposed to shew that he had subsequently gained a settlement in the parish of Clopton. The facts proved by them were these:—A few days after Michaelmas, 1807, the pauper, being a single man, let himself to Mr. *Keen*, a farmer, of Clopton, in Suffolk, for a year, to commence at the Michaelmas-day following. The pauper went into the service accordingly, and stayed his time. He slept all the time at Clopton, and received his wages. A year and a half before the pauper entered into the

service of Mr. Keen, he had been inrolled as a member of the Helmingham corps of volunteers, which corps was duly constituted according to the acts relating to corps of yeomanry and volunteers in Great Britain. During all that time, and throughout his year's service, the pauper duly attended muster, and was duly returned by the commanding officer as an effective member of the corps. He did not communicate the fact of his being a member of the corps to Mr. Keen until he had entered his service, nor did he ever give fourteen days' notice of an intention to quit the corps. He did not take the oath of allegiance according to 44 Geo. 3, c. 54, s. 20.

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The sessions were of opinion that he was not *sui juris* at the time of letting himself to Mr. Keen, although he had not taken the oath of allegiance. If the Court shall be of that opinion, the order of sessions to be confirmed—otherwise, to be quashed.

*Austin*, in support of the order of sessions. Had the pauper taken the oath of allegiance, he clearly would not have been *sui juris* at the time of the hiring. *Rex v. Westerleigh (a)*, *Rex v. Winchcomb (b)*, *Rex v. Beau-lieu (c)*. The only question is—whether it was necessary, in order to constitute him an effective member of the volunteer corps, that he should have taken the oath of allegiance? The 20th section of 44 Geo. 3, c. 54, requires volunteers to take the oath of allegiance, but the words of that section are, it is submitted, *directory* only. Where the words of a statute are in the *affirmative* only, the act is *directory*. Thus, by the statute 25 Geo. 3, c. 84, s. 7, poll clerks are in specific terms required to take certain oaths, and yet this has always been considered as *directory*. In *Rex v. Corfe Mullen (d)* there

(a) Burr. S. C. 753.

(b) 1 Dougl. 391.

(c) 3 Maule & Selw. 229.

(d) 1 Barn. & Adol. 211.

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was a question whether a man gained a settlement by executing the office of tithing-man for a year, he not having been sworn into the office by taking the oath which the court leet by which he was chosen, had ordered him, under a penalty of 5*l.*, to take within one month: and it was held that he gained a settlement. The Court observed, that "swearing in may be rendered necessary, either to enable the party to serve the office, or to impose a greater sanction on his discharge of it." That case they considered to come within the latter view; and they likened the case to that of the churchwarden, concerning whom it was said to have been decided in an *anonymous* case, 1 *Ventris*, 267, that he may execute his office before he is sworn, though it is *convenient* that he should be sworn. It is submitted, that in *this* case the oath is required for the purpose only of imposing a greater sanction on the discharge of the duties of the volunteer, and that, therefore, the pauper was an effective member of the corps in which he was inrolled, although he had neglected to take the oath.

*Gurdon*, *contra*. It must, perhaps, be admitted that the pauper was an effective volunteer, notwithstanding the omission to take the oath of allegiance; and, therefore, the question is, whether a *volunteer* is upon the same footing as a *militia-man*, who, it is admitted, is not *sui juris*. It is submitted that he is not so, and that a volunteer, inrolled under 44 *Geo.* 3, c. 54, was *sui juris*, and capable of entering into a contract of hiring. The *militia-man* may be arrested and compelled to serve, is subject to the articles of war, and may be treated as a deserter. *He*, therefore, has not the command of his time. But the *volunteer*, on the contrary, could not be compelled to train. His attendance was voluntary, and his non-attendance was punished only by a fine, to which

each company, by rules and regulations of its own, agreed to submit, and the amount of which was fixed by themselves. The crown had no greater control over him than over any other subject of the realm. The volunteer act gave the crown authority to call out the volunteers to active service only in case of *invasion* by a foreign enemy. This is nothing more than the ancient prerogative of the crown as to *all* its subjects, as appears from *Blackstone's Commentaries*(a), *Hawkins P. C.*(b), and *Dalton's Sheriff*(c), and also from the preamble to the act for the defence and security of the realm(d), in which it is stated to be the "ancient and undoubted prerogative of the crown to require the military service of all the liege subjects, in case of an invasion of the realm by a foreign enemy." As this was the extent of the pauper's obligation, and as he contracted to do no more by becoming a volunteer than every person not infirm, between the ages of fifteen and sixty, was by the act last-mentioned compellable to do, he was capable of entering into this contract. [*Littledale, J.* Was not the volunteer under the control of his officers?] Only whilst under arms. If this pauper was not *sui juris*, every person above the age of fifteen and under sixty is in the same situation.

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The Court called upon *Austin* to answer that argument.

*Austin.* The question seems to be, whether the pauper was less *sui juris* by the volunteer act, than by 43 Geo. 3, c. 96, the act for the defence of the realm. By

(a) 1 Black. Com. 343; 4 Bl. C. 122. (c) 196, title, *Posse Comitatus*.  
 (d) 43 Geo. 3, c. 96.

(b) 1 Hawk. P. C. c. 22.

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the 22nd section of 44 *Geo. 3*, c. 54, volunteers, upon a general signal of alarm, are to assemble, and from that time may be deemed deserters, and are made subject to the mutiny laws. By sections 30 & 31 no volunteer is allowed to quit his corps without giving fourteen days' notice, and giving up his arms, and paying all fines due from him. There are likewise other statutes which give the crown greater powers over volunteers than it possessed, either at common law or by 43 *Geo. 3*, c. 96.


The Court granted *Austin* permission to refer to these on a future day.

*Austin* on another day referred the Court to 42 *Geo. 3*, c. 90, s. 99; 55 *Geo. 3*, c. 65; 55 *Geo. 3*, c. 168.

*Cur. adv. vult.*

On a subsequent day in the term,

LORD DENMAN, C. J., delivered the judgment of the Court.—The question in this case is, whether a person who was at the time a member of a volunteer corps, could gain a settlement by hiring and service? We have been referred to the volunteer act, (44 *Geo. 3*, c. 54,) to the act for the defence of the realm, (43 *Geo. 3*, c. 96,) and to the militia acts of 42 *Geo. 3*, c. 90, 55 *Geo. 3*, c. 65, and 55 *Geo. 3*, c. 168. It seems to us that the volunteer act puts a volunteer upon the same footing as a militia-man; and that, by becoming a volunteer, the pauper in this case had put it out of his power to contract to serve his master during the whole year. This case, therefore, comes within the authority of the militia-man's case, in which it was held that no settlement was gained.



Sir *John Campbell*, amicus curiæ. Lord *Erskine* wrote a celebrated book upon the subject, in which he came to the same conclusion.

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LORD DENMAN, C. J.—We are glad to hear our opinion confirmed by that of so learned a person. We thought it strange that the question should never before have been considered.

Order of Sessions confirmed.

The KING v. FORD and others.

THIS was an indictment for an assault. The first count stated that the defendants, in the parish of St. James, Westminster, made a violent assault upon one *Scattergood*, he then and there being in lawful possession of certain goods and chattels which had been seized and taken possession of by *Thomas Denham*, collector of assessed taxes for the parish aforesaid, for the sum of 6*l.* 15*s.* 6*d.* for arrears of assessed taxes due from the said *Ford*, with intent the said *Scattergood* from and out of the possession of the said goods wrongfully and unjustly to force and expel and put out, &c. The second count was for a common assault on *Scattergood*. Plea; not guilty. The indictment, which was found by the jury, authorized a levy under 43 Geo. 3, c. 99, s. 33, for arrears of assessed taxes, it is not necessary that those arrears should have been demanded by the collector in person upon the householder in person, or that there should have been a direct refusal of payment to the collector in person. But it is sufficient if a demand have in fact been made by the collector or a person authorized by him, and the householder has refused payment, whether on the ground of inability or for any other cause.

Nor is it necessary that the collector should in the demand have specified the exact sum.

Where a count in an indictment stated that the defendant made an assault upon a person who was in lawful possession of goods under a levy for a specified sum of money for arrears of assessed taxes, with intent unlawfully to force him out of possession,—Lord Denman, C. J., held that it was necessary to prove that the specific sum was due, although he thought that no sum need have been stated.

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Middlesex grand jury, at the Clerkenwell Sessions House, was removed into this Court by certiorari, and the prisoners were tried at the Middlesex sittings after last term, before Lord *Denman*, C. J. It then appeared that arrears of assessed taxes being due from *Ford*, *Denham*, the collector for the parish, in company with *Pollard*, whom he had duly authorized to collect taxes, called at the house of *Ford* for the purpose of demanding payment. *Ford* was from home; but *Denham* and *Pollard* saw at his house a woman, to whom they stated that they had come to demand payment of the arrears of the taxes, and that if they were not shortly paid, a distress would be put in. The woman said that *Ford* was unable to pay; and *Ford* himself shortly afterwards called on *Pollard*, and stated that he was unable to pay. *Pollard*, under the authority of *Denham*, made a levy upon the goods, &c. in *Ford*'s house, and put *Scattergood* into possession. Whilst he was so in possession, a violent assault (the subject of the present indictment) was made upon him by the defendants, with a view to compel him to abandon the seizure. It was objected to the first count of the indictment that it was not supported by the evidence, inasmuch as it was not shewn that the precise sum of 6*l.* 15*s.* 6*d.*, for which the distress was stated in the indictment to have been made, was in fact due. Lord *Denman*, C. J., thought that the sum need not have been stated; but that being stated, it could not be rejected as surplusage, but must be proved as laid. The first count being thus disposed of, it was objected that the evidence did not warrant a conviction upon the second count; for that the assault was justifiable for the purpose of putting *Scattergood* out of possession, unless he were shewn to have been legally in possession, which he could not be, unless there had been such a *refusal* on the part of *Ford* to pay the taxes,

as required by 43 Geo. 3, c. 99, s. 33. It was contended that under this enactment no levy could be made, unless there had been a direct refusal by *Ford* to the collector, upon a personal demand made by him to *Ford*, or upon a written paper containing such demand, having been left at *Ford's* house. For this position, the case of *Cullen v. Morris* (a) was cited. Lord *Denman*, C. J., however, over-ruled the objection, and told the jury that it was not necessary that there should be a refusal by the householder himself, and that it need not be to the collector in person, but that it was sufficient if it was made to any person properly authorized by him to collect,—if, in common language, there was a refusal to pay. The jury found that there had been a refusal to pay, and returned a verdict of guilty. On a day in this term, the prisoners being brought up for judgment,

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*Humfrey* moved for a new trial, on the ground of misdirection. The act (43 Geo. 3, c. 99,) gives to the collector power to levy only where payment of the assessed taxes is *refused* by any person "*upon demand made by the collector* or collectors of the division or place." In *Cullen v. Morris*, which was an action against the High Bailiff of Westminster, for refusing to receive the vote of the plaintiff at an election, on the ground that he had not paid his rates, *Abbott*, C. J., said, "There has been no personal demand of the rates which are due from him, and no written paper containing a demand of these rates has been left at his house, although an application has been made at the house. It appears to me therefore he had a right to vote." Here, there was no personal demand, nor any written

(a) 2 Starkie, N. P. C. 577.

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paper, containing a demand by the collector, left at *Ford's* house, although an application was made at his house. If so strict a rule is to be observed under circumstances such as those in the case of *Cullen v. Morris*, à fortiori ought it to be adopted in this case, for here the consequences of the refusal are more highly penal. Not only should the demand have been personal, but also the sum claimed should have been stated.

*Sir John Campbell* elected to shew cause in the first instance. The point made, that there must be an express refusal to the collector in person, upon a demand personally made by him to the householder in person, is utterly without foundation. The language of the act is simply that "if any person shall refuse, upon demand made by the collector," then the collector may levy. It does not say in what manner the demand must be made by the collector, or in what way the party must refuse. If the argument on the other side were correct, then no levy could ever be made if the householder chose to keep out of the way. There can be no doubt that the demand and refusal were both sufficient. They would be sufficient in case of a motion for an attachment for non-performance of an award. The case of *Cullen v. Morris*, which was a case as to whether a voter was disqualified by non-payment of *rates*, has no bearing at all upon the question.

*Humfrey*, in support of his rule. The observation, that the act of parliament could not be carried into effect if the householder chose to keep out of the way, is met by the admission that, under the authority of *Cullen v. Morris*, a written demand, left at the house, would be sufficient. The demand of the servant is not sufficient

unless it be shewn that she possessed the character of an agent. Such a demand would not be sufficient in the case referred to of an award. [*Littledale, J.* The act of parliament certainly does not require that the *refusal* should be made to the collector, but speaks only of refusal upon demand made by the collector. As far as the *refusal* goes, the case seems quite complete.] The *demand* was not sufficient. *Cullen v. Morris* is a strong authority in favour of the defendants.

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*Cur. adv. vult.*

LORD DENMAN, C. J., on a subsequent day said— After considering the act of parliament and the case cited in the argument, we are of opinion that this application ought to be refused. It is not necessary that a demand should be made on the householder himself, or that the precise sum should be specified. A distress may be put in, if a demand of the taxes has been made, and there has been a refusal to pay on the ground of inability, or for any other reason. *Cullen v. Morris* relates to a matter totally different from that of the present case; and the principle of it is not, we think, applicable here.

Rule discharged.



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*The KING v. The Inhabitants of CREGRINA.*

*A. being, with H., C. and D., next of kin to an intestate taken out administration, and then all four join in a mortgage of a leasehold tenement, in the parish of Dale, formerly the property of the intestate, and divide between them the money advanced. Subsequently H., in consideration of a sum of money then paid, verbally agrees with C. to sell him all his interest in the tenement, and, after a lapse of some time, pays C. and D. in retaining all their interest in it. Held, that it did not constitute a sale, but was a mere loan, and that the agreement was void as being contrary to the statute in that behalf.*

UPON appeal against an order for the removal of *Septimus Lloyd*, his wife and children, from the parish of Cregrina to the parish of Glasscombe, both in the county of Radnor, the Sessions quashed the order, subject to the opinion of this Court on the following case :

*Septimus Lloyd* had, before 1830, acquired a settlement in Glasscombe, by renting a tenement in that parish. His father, *John Lloyd*, died in 1822, intestate, possessed of a leasehold tenement in Cregrina, which he held for the residue of a term of 999 years, at a pepper-corn rent, leaving a widow and four sons, viz. *John*, *James*, *Septimus* (the pauper), and *William*. On 4th August, 1828, administration was granted to *James*. By indenture, dated 23d August, 1828, between *James* (the administrator), *John*, *Septimus* (the pauper), and *William Lloyd*, and *Mrs. Guise*, the tenement was assigned by *James Lloyd* (the administrator), and confirmed by *John*, *William*, and *Septimus Lloyd*, to *Mrs. Guise*, by way of mortgage, for the residue of the term, for securing 100*l.* and interest. The four brothers divided the 100*l.* equally among them, executed the deed, and signed the receipt; and covenanted for the repayment to *Mrs. Guise* of the 100*l.* and interest. At the time of this transaction the pauper resided in Glasscombe. About a year afterwards, whilst residing in Cregrina, he agreed verbally with his brother *William* to sell him all his interest in the leasehold tenement, in consideration of *William's* paying the pauper's share of the 100*l.* and of interest due and to grow due, and of the cost of C. &c. which he was allowed to the pauper by *William*. About a year after making this agreement,

ne pauper removed into a cottage in Cregrina, and continued there until his removal under the order, but did not interfere with the leasehold tenement. In September, 1832, *William Lloyd*, on behalf of himself and of his brothers *James*, *John*, and *Septimus*, gave a written notice to *Mrs. Guise*, that at the expiration of six months the principal and interest on her mortgage would be paid off. By indenture, dated 29th April, 1833, *John*, *James* (the administrator), and *Septimus* (the pauper), in consideration of 30*l.*, released and assigned all their interest in the leasehold tenement to *William Lloyd*. No money passed to the pauper; *William Lloyd* claiming and retaining the pauper's fourth share, under his bargain made three years before, and having received and retained the intermediate rent accruing in respect of such fourth share.

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*Biggs Andrews* in support of the order of sessions. The pauper was, at the time of his residence in Cregrina, possessed of a distributive share in the equity of redemption; and an *equitable* estate is sufficient for the purposes of settlement. Although the legal estate in the term had, by the administration, vested in *James Lloyd* alone, yet after the assignment by way of mortgage, in which all the brothers joined, and by which all equally covenanted to repay the 120*l.* and interest, the equitable right to compel the mortgagee to re-convey the term upon repayment of the 120*l.* and interest, vested equally in all. The agreement of the pauper with his brother for the sale of all his interest in the leasehold tenement, was a mere verbal agreement, and was not executed until three years after; before which time he had resided for more than forty days in Cregrina.

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*Adolphus*, contrà. At the time of the residence of the pauper in Cregrina, he had parted with all interest in the leasehold premises to his brother. The agreement, though verbal, having been followed by payment or allowance of the 2/., was sufficient to pass whatever equitable interest the pauper may have possessed (*a*).

LORD DENMAN, C. J.—The legal estate was in the administrator. The pauper had at one time, after the execution of the mortgage deed, an interest in the equity of redemption, which interest he parted with by his agreement to sell to his brother. He could clearly have no equity after the agreement. I am therefore of opinion that the order of sessions cannot be supported.

LITLEDALE, J. and WILLIAMS, J., concurring,

Order of Sessions quashed.

(*a*) As to the cases in which payment of part of the price will, in equity, take a verbal contract out of the statute of frauds, see *Barlett v. Pickersgill*, 1 Eden, 516; *Main v. Melbourn*, 4 Ves. jun. 720; *Clinan v. Cooke*, 1 Schoales & Lefr. 40.

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## REECE v. TAYLOR and another.

**TRESPASS** for an assault and false imprisonment, and for carrying the plaintiff from a certain house and shop through the public streets to a police office. Pleas: first, not guilty; and secondly, by the defendant *Taylor*, that he was lawfully possessed of the house and shop, and that the plaintiff was unlawfully therein making a great disturbance against the will of *Taylor*; that *Taylor* requested him to depart, which he refused to do, whereupon *Taylor* gently laid hands upon him to remove him out of the house and shop; that thereupon the plaintiff, in the presence of a police officer, assaulted *Taylor*, upon which *Taylor* gave him into custody, and caused him to be carried from the house and shop along the public streets to the police office. Replication: *de injuriâ*. At the trial before Lord Denman, C. J., at the Westminster sittings after the last term, it appeared that *Taylor* was in the possession of the house, and that the plaintiff was unlawfully there, and was asked to depart; that upon his refusing to do so, *Taylor* called in a policeman, who, under the directions of *Taylor*, and upon a charge for an assault, conveyed the plaintiff to the police office; but it was not shewn that any assault had been in fact made by the plaintiff on the defendant. The learned judge thought that the defendant *Taylor* was justified in removing the plaintiff from his house, but that he had failed to shew a justification of the taking through the streets to the police office, and that therefore the plaintiff was entitled to recover damages in respect thereof. The jury found a verdict for 50*l.* damages. In the early part of this term,

To trespass for an assault and false imprisonment, the defendant pleaded that he was in lawful possession of a house, and that the plaintiff was unlawfully therein, and had been requested to depart, but had refused, whereupon the defendant gently laid his hands on him to remove him; that thereupon the plaintiff assaulted him in the presence of a policeman, wherefore he caused him to be taken to a police office. Replication, *de injuriâ*. The defendant proved all the matters of the plea, except the assault by the plaintiff:—Held, that the plaintiff was entitled to recover damages for the imprisonment.

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*Maule* moved for a new trial. The learned chief justice was wrong in directing the jury that the plaintiff might recover in respect of the taking to the police office. That was matter of *excess*, and in order to enable the plaintiff to recover in respect of it, should have been replied by way of new assignment. Under *de injuriâ*, the plaintiff could not recover for this excess. [*Williams*, J. Your general replication puts in issue all the facts of the plea. Now, in that plea, there is a statement of an assault *by the plaintiff* on the defendant, in the presence of a policeman, which statement is necessary to justify all the trespasses complained of in the declaration, except the mere removing out of the house. You failed in proving that. Was not this good ground for the plaintiff having damages? Lord *Denman*, C. J. I acted upon the ground which my brother mentions.] It is not denied that the plaintiff shewed a right to recover damages—as far as the question depended upon the *evidence*—for the assault may not have been commensurate with the justification; but the argument now submitted to the Court is, that upon the *pleadings*, the plaintiff was debarred from recovering for this *excess*, for that it ought to be *replied*. [*Little- dale*, J. The observations of the judges in *Cockcroft v. Smith*(a), amount to this, that under the plea of son assault demesne, the defendant must shew an assault by the plaintiff *commensurate* with the act complained of by the plaintiff. According to what is there said, you cannot *sustain your plea* of son assault demesne, unless you shew a *commensurate* assault.] That is so, but the defect cannot be taken advantage of unless the plea be properly replied to. [*Littledale*, J. I admit that the practice is with you.] In *The Six Carpenters' case*(b),—

Upon issue taken on a plea of son assault demesne, it is necessary to prove an assault commensurate with the trespass sought to be justified.

(a) 1 Salkeld, 641.

(b) 8 Co. Rep. 146.

[*Littledale, J.* That case does not at all turn upon the manner of pleading.] Excess is *affirmative* matter, and must be averred by replication. Upon these pleadings the plaintiff was entitled to judgment for the whole matter or none. [*Williams, J.* The defendant having failed to prove all the facts in the plea, which were necessary to justify the trespass complained of, is not the plaintiff entitled to damages? Can you make it a ground of complaint, that the part of the trespass which was in fact justified, was withdrawn by the learned judge from the consideration of the jury? Lord *Denman, C.J.* There are clearly two distinct sets of facts complained of, and two distinct parts of the justification. The possession of the house was a justification of one only, and therefore in respect of the other, which was not justified, the plaintiff was entitled to damages.] It was all done at once, and constituted but one trespass—not justified to the full extent, it is admitted—but still it was but one act of trespass. [*Littledale, J.* You are bound to prove the whole of the allegations in your plea, or so much of them as constitutes a defence to the action. This you have failed to do. *Williams, J. Spilsbury v. Micklethwaite (a)* decides, that where two facts are pleaded, which are equally of themselves defences to the action, proof of one is sufficient. But here, the assault which you failed to prove, was a necessary part of the defence. You have not supported your plea. *Littledale, J.* It was incumbent on you to prove the assault, in order to shew that you were warranted in imprisoning the plaintiff. Until you have proved the allegations in the plea, you cannot raise the question of excess.]

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Per CURIAM—

Rule refused.

(a) 1 Taunt. 146.

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## The KING v. HALL and DYER, Esquires.

This Court will not issue a mandamus to compel magistrates to issue a distress-warrant to enforce the payment of poor-rates, where it is doubtful whether the warrant would be legal (a), and the rates are recoverable by another mode of proceeding.

Where, by a local act for the government of a parish, collectors of the rents of houses, &c. within the parish, "the yearly assessment or valuation whereof respectively shall be less than 30*l.*," are made liable to be rated, and compellable to pay the rates in respect of such houses, &c.—*Seemle*, that the liability of

A Rule nisi for a mandamus was obtained, commanding Messrs. *Hall* and *Dyer*, two justices of the peace for Middlesex, to make and issue their warrant of distress against the goods of *James Veale*, to enforce payment of a poor-rate for the parishes of St. Giles in the Fields and St. George, Bloomsbury, in respect of his receipt of the rent of certain houses.

By 11 *Geo.* 4, cap. x. for the regulation of the affairs of the two parishes, a vestry was reconstituted. By section 88, all rates were to be paid by the tenant or occupier; and if any tenant, occupier, or any other person made liable to pay any rate, should refuse or neglect to pay the same after demand made, payment of the rates might be enforced by distress. By section 92, the lessors, landlords, and owners of all houses, &c., the yearly assessment or valuation whereof should be less than 30*l.*, or which should be let at rents which should become payable or be collected at any period shorter than quarterly, and in certain other cases, were to be rated and pay the rates in respect of such houses, &c. By section 93, to prevent any dispute touching the designation of lessors, landlords, or owners of houses, buildings, &c. intended to be made liable to the payment of any rate, the persons authorized to receive or collect the rents of any houses from the tenants or occupiers thereof were to be deemed and taken to be the lessors, landlords, or owners of such houses, &c. for the liability of the collector would extend only to cases in which the *real*, and not the *assessed* value of the houses respectively, &c. is under 30*l.*

(a) And see *Rex v. Justices of Bucks*, 2 Dowl. & Ry1. 689, and 1 Barn. & Cressw. 485; *Underhill v. Ellicombe*, Macl. & Younge, 450; *Fawcett v. Foulis*, 1 Mann. & Ry1. 102, and 7 Barn. & Cressw. 394; *Rex v. Justices of Bucks*, *ante*, vol. ii. 37.

purposes of that act, and to be liable to be rated, and to be compellable to pay the rates, in all cases in which either lessors, landlords, or owners, were by that act made liable to be rated and to be compelled to pay such rates, unless the real lessors, landlords, &c. should declare themselves, and should voluntarily pay such rates as aforesaid, or should be distinctly or certainly known to be such by the vestrymen. By section 95, the goods of all persons occupying any houses, &c. liable to the payment of the rate, wherever the lessors, landlords or owners were, by that act, made liable as aforesaid, were to be liable to be distrained upon for any rates accruing during the occupancy of such persons respectively, although such persons were not rated under that act. By section 96, in default of payment of any rate in respect of any houses assessed at less than 30*l.*, &c. the same was to be a charge upon such houses, and might, after fourteen days' notice, be recovered from the landlord or owner by action of debt.

A rate was made upon *Veale* as the collector of the rents of fourteen houses in various streets, &c. in St. Giles's, which houses are part of an estate consisting of 150 houses, called *Spencer's* estate. Mr. *Spencer*, a gentleman residing in Wales, was seised in fee of these houses, and *Veale* was the collector of his rents. One of the vestrymen was a tenant of another part of Mr. *Spencer's* estate, and was aware that Mr. *Spencer* was the owner of the 150 houses and that *Veale* was only his collector. All the houses were *assessed* at less than 30*l.* a year, but six of them were actually *let* for upwards of 40*l.* a year. Six others were let at rents under 30*l.*, but the rent was payable quarterly, the tenants undertaking to pay all the parochial taxes. *Veale* had paid over to Mr. *Spencer* all the rents collected by him. An application having been made to Messrs. *Hall* and

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*Dyer*, to issue their warrants to enforce the payment, by *Veale*, of the rates upon the said houses, they refused to do so.

Sir *John Campbell* now shewed cause. The Court will not compel magistrates to issue a warrant for enforcing the payment of rates, if there be another mode of recovering them, or if it is doubtful whether the warrant would not be illegal. The warrant here *would* be illegal on two grounds:—First, the section limits the liability of collectors of rents to cases in which the yearly assessment or valuation is less than 30*l.*, and to certain other cases. Some of the houses in question are let for more than 30*l.* a year, and therefore are not, it is submitted, within the limits of the clause, notwithstanding that the amount at which the vestry have thought proper to *assess* them falls short of that sum. Secondly, the liability of the collectors of rents is further limited, by section 93, to cases in which the landlord is not known to the vestry. In this case the landlord must be taken to have been known to the vestry, as one of the vestrymen, who was indeed the chairman of the vestry, was aware that these houses belonged to Mr. *Spencer*, and that *Veale* was only his collector.

There is in this case another mode of recovering these rates. By section 96, the rate is to be a charge upon the premises, and after fourteen days' notice may be recovered, by action of debt, from the landlord.

*Thesiger* and *Adolphus*, in support of the rule. If it appear to the Court that these rates are clearly recoverable by a distress warrant, the Court will put the law in motion, and issue a mandamus. By section 88, if any tenant, occupier, or any other person made liable to pay any rate, shall refuse to pay, a distress-warrant may be

issued. It is obvious, from the language of this section, that some other person besides the tenant or occupier is liable to be distrained upon for these rates: By section 92, the *owner* is to be liable where the yearly *assessment or valuation* is under 30*l.* It is therefore immaterial what the *rent* is. By section 93, the *collector* of the rents of such properties is to be treated as the owner, unless the owner is known to the vestry. The owner in this case was unknown to *the vestry*, notwithstanding that he appears to have been known to one of the vestrymen. *Veale*, as collector, was consequently liable to be rated. But it is said that there is a remedy by action of debt. Is that an exclusive or is it a cumulative remedy? The 95th section shews that it was only intended as one of several *cumulative* remedies, as it also expressly makes the goods of the occupier liable to be distrained for rates which have become due during his occupancy. Looking at the several clauses of this act, there can be no doubt but that a distress warrant might legally have issued against *Veale*; and therefore the Court will make the rule absolute.

LORD DENMAN, C. J.—This is a very large and extraordinary power that is given to the parish, to call on collectors of rents for the payment of the rates. I think there may be very good sense in making these collectors, who actually have the profits of the estates in their hands, liable to pay the rates to the parish: but before the Court can compel the issuing of a warrant of distress on the goods of the party, we must see very distinctly indeed that the act gives that authority. I confess I very much doubt, upon all the points in this case, whether that authority is given. I have some doubt whether, when it is said “assessed at 30*l.*,” the meaning was not “assessed on a *rent* of 30*l.*” I have some doubt

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upon that, though perhaps the words of the statute would import that the *assessment* should be 30*l.*; yet I believe it is very common to consider that the assessment *ought* to be made upon the true rental, so that such phrase might possibly mean that (*a*). The parish have, in addition to the remedy by distress, a power of *suing* the owner of the estate wheresoever he may be; and it is provided that at all times the estate shall continue charged with the payment of the rates. That being so, I think that we ought not to compel magistrates to issue their warrant of distress in the manner prayed. It ought to be very distinctly shewn that it is the duty of the magistrates to issue a distress-warrant before we call upon them to expose themselves to the risk of an action. That does not appear in this case. I think therefore the magistrates are quite justified in having refused to issue this warrant.

LITLEDAL, J.—This rule should be discharged. I think that this Court ought not to call upon magistrates to issue a distress-warrant, unless the case is perfectly clear, and there is reason to suppose that the magistrates act from some kind of bias, or that they wilfully withhold the warrant. We are bound to see that they are *bonâ fide* discharging their duty in refusing the warrant; but if we find the magistrates acting *bonâ fide*, a very strong case ought to be made out to induce this Court to call upon them to issue a warrant which may subject them to an action, against which there appears to be no indemnity;—more particularly in this case, for there is another remedy given by the 96th section.

(*a*) Otherwise the vestry would appear to have the power (by altering, or omitting to alter, the nominal standard of the assessment, which is frequently below

the real value,) of bringing whatever houses they thought proper within the provisions of this section of the act.

It is much to be regretted that in these acts of parliament, where magistrates are called upon to issue warrants, there is not a clause introduced indemnifying them against actions, when they issue warrants under the authority of this Court. Were such a clause introduced, the magistrates, when acting under the authority of this Court, would run no risk, and the Court would not have the same difficulty in granting a mandamus.

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WILLIAMS, J.—We ought to be very cautious how we interfere, by mandamus, to enforce that remedy by distress which, it is very clear, might not only place the magistrates in a difficulty, but also place Mr. *Veale* in a very extraordinary position. We ought very clearly to see that the case is brought within the provisions of the act, before we venture to interpose. I am by no means satisfied that we ought not to have some more distinct statement of the absence of knowledge, by the vestry of who was the owner of this property. If I were left to conjecture, I should rather say that the vestry were *not* in ignorance upon this point. Without however entering further upon that question, it appears to me that there is another remedy, and that we should not be shewing a due regard for the safety of these magistrates, if we issued this mandamus.

Rule discharged.

Sir *J. Campbell* then applied for costs; but as Mr. *Coste*, *Spencer*, and not the magistrates, shewed cause, the Court discharged the rule *without costs*.



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The holding over for twenty years by lessee for years determinable on lives at a nominal rent, who, at the commencement of such holding over, falsely asserts that one of the cettoux que vies is alive but omits to pay the reserved rent, is not an adverse possession barring the entry or ejectment of the reversioner.

So, although the reversioner has notice of the cesser of the term and grants a fresh lease to another person, who neglects to enter for more than twenty years.

ON appeal, an order by which *Richard Hooper* was removed from Axbridge to Chapple Allerton, Somerset, was quashed, subject to the following case:—

Lord Viscount *Weymouth* granted to one *Martin* a lease of a cottage in the parish of Cheddar for ninety years, determinable on three lives, at a rent of 4*d.*; and in 1784, the cettoux que vies in lease of 1732 being all dead, the then Lord *Weymouth* granted to *Richard Gilling* a lease of the same cottage, therein stated to have lately fallen into his lordship's hands, for a like term, determinable on three other lives, at the same rent. At that time *Joseph Wolf*, who was in possession under the lease of 1732, claimed to hold the cottage against *Gilling*, on the ground that one of the three lives in that lease was still in existence, which was not the fact; and he did so hold the same until his death, about twenty-three years ago. On his death his widow, *Ann Wolf*, retained possession of the cottage, and continued therein until her death in 1827. In 1826 she made a will, and told the person who made it for her she had heard the cottage was Mr. *Gilling's*. By the will she devised the cottage to her daughter *Martha*, the wife of *Richard Hooper*, (the pauper,) and her heirs, and appointed *Martha Hooper* her executrix and residuary legatee. The will was duly attested to pass real estate, but no probate thereof was obtained. On the death of *Ann Wolf*, *Richard* and *Martha Hooper*, who had been living with her in the cottage, kept possession of it and lived there for three years, when *Richard Hooper* conveyed it by feoffment and livery to a purchaser in fee, for 8*l.*, it being well worth 40*l.* with good title. No rent has ever been paid by *Joseph Wolf*, or those claiming under him, but

*Gilling* and his representatives have paid the rent of 4*d.* to Lord *Weymouth* and his heirs to the present time. One of the *cetteux que vies* in the lease of 1784 is still living.

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The question is, whether *Richard Hooper* took such an interest or estate as (coupled with residence) conferred upon him a settlement in Cheddar. If he did, the order of sessions is to be confirmed; if not, the order to be quashed.

*Bere*, in support of the order of sessions. The pauper gained a settlement either by virtue of residence on an estate acquired by adverse possession, or by residing on property which had come to his wife as *tenant* to Lord *Weymouth* by virtue of the will of *Ann Wolf*.

I. As to the adverse possession. There has been possession for fifty years without any acknowledgment of the title being in any one else. The observation made by *Ann Wolf*, at the time of making her will, can scarcely be regarded as an acknowledgment of title; nor can the fact of *Joseph Wolf*'s having claimed to hold on the ground that a life in the lease of 1732 was in existence, operate to prevent the possession from being considered adverse; for in all cases of adverse possession there is something like a false claim of title held out. In *Doe d. Foster v. Scott* (a), copyhold lands were granted to *A.* for the lives of herself and *B.*, and in reversion to *C.*:—*A.* died having devised to *B.*, who entered and kept possession for more than twenty years: On his death *C.* brought ejectment. It was held, that the action was barred by the Statute of Limitations (b). That

I. First point.  
Adverse possession.

(a) 7 Dowl. & Ryl. 190; 4 Barn. & Cressw. 706.

(b) This decision proceeded on the ground that as there can

be no *general* occupant of a copyhold, *B.* took no estate, and that therefore *C.*'s right of entry accrued immediately on the death

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case is very similar to this. Here, the possession commenced in 1784. At that time all the *cetteux que vies* were dead. The question is, when did the title of Lord *Weymouth* accrue? Certainly at the time when, as Lord *Weymouth* himself states, the first lease expired. At all events the possession since the death of *Joseph Wolf* has been adverse, and that possession has been for more than twenty years. It appears, from the finding of the sessions in favour of the appellants, that in their opinion the possession was adverse.

Second point:  
 Right to reside.

II. If *Ann Wolf* was in *as tenant*, and not by adverse possession, her interest was transmissible by will, and having been devised by her to her daughter, whom she also appointed her executrix, the daughter took an interest as tenant, and the husband, by virtue of his marital right, gained a settlement. The question upon this part of the argument must be, whether an executor who has not proved the will, has such a right to reside on the estate of the testator as gives him a settlement. In *Rex v. Horsley (a)* it was determined, that a sole next of kin has such an equitable interest in a leasehold tenement of the intestate that he gains a settlement by residing forty days in the same parish after the intestate's death, and before administration granted to him. If an *administrator* has such a right before the granting of letters of administration, *à fortiori* must an executor have it before the granting of probate; for the principle of *Rex v.*

*of A.*—But the reason why there can be no general occupant of a copyhold, is stated to be, that the freehold is in the lord, who is entitled to enter upon the death of tenant *pur auter vie*, and hold during the life of *cestui que vie*. *Ven v. Howell*, 1 Roll. Abr. 511; and 6 Vin. Abr. title

Copyhold, (P.) pl. 3; *Smartle v. Penhallow*, 2 Lord Raym. 994, 1000, and 1 Salk. 183. In *Doe d. Foster v. Scott*, therefore, *C.*'s right of entry could not have accrued until the death of *B.*—But this point was not presented to the Court.

(a) 8 East, 405.

*Horsley* is, that if a party has the exclusive right to call on the Ecclesiastical Court to clothe him with the legal title, and he resides for forty days in the parish, he gains a settlement. In *Rex v. Stone* (a) it was held, that the executor of a tenant from year to year of an estate under 10*l.* a-year, may gain a settlement by residing on it forty days. In *Rex v. Thruscross* (b) the Court held, that a person who had no *estate* either at law or in equity, but merely a right to reside on the property, might gain a settlement in respect of that right. An executor before probate has such an interest in the estate of testator, that he may receive and pay money and do a variety of other matters.

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*Rogers* and *Moody* contra.

I. The first possessor of the estate is *Joseph Wolf*. First point. He claimed to hold under the first lease. His possession cannot therefore be considered as adverse, *Doe v. Reed* (c), and under him alone could the pauper claim. *Ann Wolf*, whose possession might with more colour be said to have been adverse, had that possession for sixteen years only. The estate bequeathed by her will would not be a continuance of the estate of her husband. There was no adverse possession until 1826. In *Burton's Compendium to the Law of Real Property* (d),—when treating on adverse possession,—it is said, “On this subject it may be observed generally, that while there subsists any *contract*, express or implied, between the parties in and out of possession, the possession cannot be adverse.” Applying that doctrine to this case;—the possession of *Joseph Wolf* was not adverse. The lord might have relied on the possession of *Joseph Wolf*

(a) 6 T. R. 295.

(b) *Ante*, ii. 201.

(c) 5 Barnw. & Alders. 232.

(d) Page 131, pl. 410.

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in an action against himself as evidence of his own seisin. The acknowledgment by *Wolf* that he held under the lease, would prevent the operation of the Statute of Limitations, *Buller's Nisi Prius* (a). The first fact from which a tortious ouster can be inferred is the making of the will; and even that is accompanied by the expression that the testatrix had heard that the property belonged to some one else. That declaration would be evidence against parties claiming under her. *Doe v. Pettett* (b).

Second point. II. *Martha Wolf* could not take the chattel interest, as no probate had been granted, *Rex v. Okeford Fitzpaine* (c). *Rex v. Thruscross* was the case of a surrenderee of copyholds, who has a good title against every one but the lord (d). In *Rex v. Stone* no objection as to the want of probate was taken. If reliance is placed on a *chattel* interest, the *probate* must be produced. *Rex v. Horsley* is wholly unlike this case, as *Martha Hooper* is not stated to have been sole next of kin. This branch of the argument offered on the other side is based upon the fallacious assumption of the existence of the term.

Lord DENMAN, C. J.—The question is, whether there is any proof of adverse possession. I do not find it expressly stated, nor do I find any facts from which it can be properly inferred. A lease was granted, in 1732, for three lives, to *Richard Martin*. In 1784, it is supposed that the lives are at an end. A new lease is then granted

(a) B. N. P. 104.

(b) 5 Barnw. & Alders. 223.

(c) 1 Barn. & Adol. 254.

(d) The customary *heir* has, before admittance, a valid seisin against all the world, except the

lord; but the *surrenderee* has no estate as against any one till admittance; he has nothing but a title to admittance as against the lord; as against all the rest of the world he has nothing.

to *Gilling*, and he pays the rent. *Wolf* claims to hold under the first lease, on the ground that one of the *cetteux que vies* is still living; and he does so hold; yet *Gilling* pays the rent during all that time to Lord *Weymouth*. It cannot be said that *Wolf* held under any other claim than this,—that the first lease was in existence. Then his wife held the property. What proof is there that she held it adversely? I see none; and even if she had claimed to hold adversely, there was not sufficient length of time to create a title by adverse possession. There is no case which would warrant us in holding that the circumstances which occurred here amount to an adverse possession; and therefore I think that the Order of Sessions must be quashed.

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LITLEDALE, J.—I am of the same opinion. In 1784 Lord *Weymouth* (now the Marquess of *Bath*) granted a lease to *Gilling*. At that time *Joseph Wolf* was in possession. How he came in we do not know; but he claimed to hold the cottage under the first lease, on the ground that one of the *cetteux que vies* was alive. He did not set up any *adverse* claim. He must be presumed to have held under the lease to the time of his death. He left a widow, who continued the possession. It must be presumed that she continued the possession in the same way as *Joseph Wolf* had done before. She devises, expressing that she had some doubts whether it did not belong to *Gilling*, (but we do not take any notice of that,) and appointed her daughter executrix. If she had entered by abatement (*a*), and made a will of it, that would have been a different thing; but she does not

(*a*) Query, “by disseisin.” by *disseising* Lord *W.*, unless he considered the widow as the first deforciant, her wrongful freehold could be acquired only by *disseising* Lord *W.*, unless he died immediately before the *disseisin*.

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do so. I do not consider that her daughter acquired any right to the fee-simple. She appointed the daughter executrix, but the daughter took no interest in any term, for there was none actually existing except that which was in *Gilling*, for the old lease was clearly gone in 1784. She could only claim in continuation of the estate which her mother had.

WILLIAMS, J. concurred.

Order quashed.

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A. is apprenticed to B., who was a tinman, by the trustees of a charitable fund, and the premium paid out of that fund. A. serves B. 3½ years, when, at A.'s request, B. verbally, and without the knowledge of the trustees, consents that A. shall serve the remainder of his time with C., a plumber, and agrees "to give to C. 6*l.* as part of the 15*l.*, paid as a premium on the binding of A., for taking him:"—Held, that the 6*l.* was a valuable consideration paid to C. "other than what was given by any parish or township, or any public charity," and that, therefore, the transfer of A. to C. was void for want of a stamped assignment, under 55 Geo. 3, c. 184, Schedule I., *Apprenticeship*.

AN order of justices, whereby *Stephen Carter*, and wife, were removed from the hamlet of *Heigham*, in *Norwich*, to the parish of *Fakenham*, in *Norfolk*, was confirmed, subject to the following case:

In order to prove a settlement in *Fakenham*, the respondents produced the will of *John Norman*, dated 19th February, 1720, whereby certain real estates were devised to trustees and their heirs, upon trust, (at certain intervals after testator's death,) to put to school, and at the age of fifteen to bind out apprentice to some trade, a son of some one of his or his first wife's relations, until the whole number of boys together in being, that should be thus put to school and provided for, should amount to thirty. And the testator directed, that as often as there should be a deficiency of the descendants of his or his first wife's relations, the

15*l.*, paid as a premium on the binding of A., for taking him:"—Held, that the 6*l.* was a valuable consideration paid to C. "other than what was given by any parish or township, or any public charity," and that, therefore, the transfer of A. to C. was void for want of a stamped assignment, under 55 Geo. 3, c. 184, Schedule I., *Apprenticeship*.

trustees should put to school and place out apprentice a son or sons of some inhabitant or inhabitants of Beer Street Ward, or Upper Conisford Ward, in Norwich, or of the parish of Catton, in Norfolk; and the testator directed, that at the end of sixty years after his decease, the number of boys should be increased by two, three, or four, in a year, until it reached 120 of his or his said first wife's descendants, if they could be known or made out by his trustees; and if not, of such others as aforesaid, out of Beer Street or Conisford Wards, and Catton, if enough were there to be had; if not, out of the neighbouring parishes in Norwich, at the discretion of his trustees,—such children of strangers to be chiefly of such parents as had been reduced by losses, and had paid to church and poor.

An indenture of apprenticeship, dated 1st February, 1821, not stamped, was then produced, by which the pauper, with his father's consent, bound himself apprentice to *H. Vincent*, of Norwich, tinman, to learn his art, for seven years, at a premium of 15*l.*, stated in the indenture to be paid to the master by *George Morse*, the treasurer appointed according to the will of *Norman*, for the purpose of annually binding out poor children apprentices; and *Vincent* covenanted with the pauper and his father and *Morse*, to teach the pauper the art or mystery of a tinman, and to pay the father 8*s.* a week for the first year, and an additional shilling a week during each succeeding year of his apprenticeship. The indenture was executed by *Vincent*, the pauper, and *Morse*. The pauper was bound out as the son of a relation of *Norman*, or his first wife. The premium was paid out of the rents of the trust estates, and the indenture was prepared by the clerk to the charity, and paid for by the charity. There never had been a deficiency of the sons of such relations, and no stranger had had the benefit of

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the bequest. The pauper served *Vincent* in Norwich, under the indenture, for about three years and a half, when, at the request of the pauper, (who was still a minor,) *Vincent* consented that he should serve the remainder of his time with his (the pauper's) brother, in his trade of plumber and glazier, and agreed to give to the brother 6*l.*, as part of the 15*l.* paid as a premium on the binding of the apprentice, for taking him. In pursuance of this agreement, *Vincent* returned to the pauper 6*l.*, as part of the premium received with him. For this sum the pauper accounted with his brother. There was no agreement in writing between the first and second masters, or between the pauper and his second master. The pauper served his brother two years, and was taught by him the trade of a plumber and glazier, and during that time slept in Fakenham. Neither the trustees under *Norman's* will, nor the treasurer, were parties to the agreement with the pauper's brother.

The counsel for the appellants objected to the indenture's being received in evidence, for want of a stamp, but the Court received it and confirmed the orders of removal.

If this Court shall be of opinion that the indenture required a stamp, either originally or upon the pauper's going to serve his brother,—or that the service with the brother was insufficient to confer a settlement, either on the ground that the trade of the brother was different from that of his first master, or that neither of the trustees nor the treasurer were parties to the agreement between his master and brother, the order is to be quashed;—otherwise to be confirmed.

*Austin*, in support of the order of sessions. If this was a public charity, the indenture did not require a

stamp (*a*). This *was* a public charity, as the bequest was of a permanent nature, and extended to a class of persons; *Rex v. St. Matthew's, Bethnal Green* (*b*), *Rex v. Clifton-upon-Dunsmore* (*c*). The object of the exemption in the stamp act, was to encourage institutions useful and beneficial to the public. The devise not only provides for the descendants of the testator and of his first wife, but likewise for the *inhabitants of the surrounding district*. The charity therefore is for the benefit of the public. This is not like the case of a devise to *individuals* by name. If this is not a public charity, neither is the charity of William of Wykeham.

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First point:  
Public charity.

II. It is said, on the other side, that even assuming this to be a public charity, a stamp *on the assignment* was necessary. No such stamp was requisite. It cannot be said that the 6*l.* paid to the brother, was "a valuable consideration given to the new master, other than what may have been given by any public charity," and therefore the assignment is within the express words of the exemption in the Stamp Act.

Second point:  
Stamp on assignment.

III. Another objection is, that the apprentice could not be assigned without the participation of the trustees. The concurrence of the trustees to the assignment was not necessary, as their duty is only to supply the money

Third point:  
Non-concurrence of trustees in assignment.

(*a*) 55 Geo. 3, c. 184, Schedule, Part I. title "Apprenticeship."  
"Exemptions from the preceding and all other stamp duty."

"Indentures, or other instruments for placing out poor children apprentices, by or at the sole charge of any parish or township, or by or at the sole charge of any public charity; or pursuant to the act of the 32d year of his majesty's reign, for the further regulation of parish

apprentices:

And all *assignments* of such poor apprentices, provided there shall be no such *valuable consideration* as aforesaid, given to the new master or mistress, other than what may have been or shall be given by any parish or township, or by any public charity."

(*b*) Burr. S. C. 574.

(*c*) Ibid. 697.

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for the premium to be paid to the master, and as soon as they have paid the money their duty is at an end. If the money is provided by them, it appears not to be necessary, to bring the case within the exemption clause of the Stamp Act, that the trustees of the charity should have executed even the original indenture; *Rex v. Quainton*(a).

Fourth point:  
 Constructive  
 service.

IV. It will be contended that the service under the second master was not consistent with the indenture. The difference of trades is not of itself a sufficient objection; *Rex v. Louth*(b), *Rex v. Banbury*(c).

First point.

*Biggs Andrews*, contra. I. This is a *private*, and not a *public* charity. At all events the charity was of a private nature at the time when this indenture was executed, for then no one had had the benefit of it, except the descendants of the testator or of his first wife. It is laid down in *Nolan's Poor Laws*(d), that the criterion of a *public* charity is, that the *object* of the charity should be *general*, without having any particular individuals in contemplation at the time it is created. [Lord *Denman*, C. J. Is not this very like *Founders'-kin*?] That would be the *same* case, *idem per idem*. As this is not a binding out under the *latter* clause of the will, the question must be considered as if the devise were for the *exclusive* benefit of the descendants. Surely, in that case, the object of the charitable bequest would be of a private nature. In *Rex v. St. Matthew's, Bethnal Green*(e), the objects of the charity were—all poor children brought up at the charity school of the parish. Here, the objects are the descendants of two individu-

(a) 2 Maule & Selw. 338.

(c) 3 Barn. & Adol. 706.

(b) 2 Mann. & Ryl. 273; S. C.

(d) P. 526, 4th edition.

8 Barn. & Cressw. 247; 1 Nev.

(e) Burr. S. C. 574.

& Man. Mag. Ca. 238.

als. Whether a charity is public or private, depends not upon its *permanency*, but upon its being or not being an institution *for the benefit of the public*. An indenture is exempted from the payment of duty *to the public*, where the premium is paid out of a charitable fund of a public nature, because the *public* have the benefit of the premium.

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II. The *assignment* required a stamp. It cannot be said that this 6*l.* was paid *by the trustees*. It was a valuable consideration paid *by the first master* to the new master, to change the relation between himself and the apprentice. It was in the nature of a new binding out, at the expense of the first master. The trustees had no participation in it. (The Court called upon *Austin* to answer this objection.) Second point.

*Austin*. It is expressly found that the 6*l.* was agreed to be given to the new master for taking the pauper, "*as part of the 15*l.* paid as a premium on the binding of the apprentice,*" and that the 6*l.* was *returned* by *Vincent* to the pauper "*as part of the premium which he had received with him.*" [Lord *Denman*, C. J. I think the meaning of the expression in the case, that the first master agreed to give to the brother 6*l.* as part of the 15*l.*, paid as a premium on the binding of the apprentice, is, that it was calculated that 6*l.* would be a *fair proportion* of the 15*l.* It could not be intended that the 6*l.* was *part of the identical 15*l.**] The words are, 6*l. as part of the 15*l.**

LORD DENMAN, C. J.—In this case, it was the *old master* that paid the new. The statement in the case, that the 6*l.* was paid *as part of the old consideration*, paid out of the charitable fund, must be construed consistently with the facts of the case. It must be taken to

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mean that the *6l.* was considered a *fair proportion* of what the original money was,—not that it was a *part* of the original money.

LITLEDALE, J.—The object of the will was, that every thing relating to the apprenticeship should remain in the hands of the trustees. A new arrangement was made, both as to the service and premium, to which the trustees were no parties. Whatever exemption, therefore, belonged to the transaction originally, it was taken away when the master stood by himself, and a transfer took place with which the charity had nothing to do.

WILLIAMS, J. concurred.

Order quashed.

The KING v. The Inhabitants of WHITNEY.

Though there cannot be a bridge which the county is bound to repair, where there is no *cursus aquæ*, yet it is a question of fact in each case, whether an arch thrown over a *cursus aquæ* is such a bridge or not. *Semble.*

The fact of the arch or bridge having no *parapets*, does not of itself prevent its being a county bridge.

Judgment by default upon an indictment for non-repair of a highway, is not *conclusive* evidence against the parish of a liability on their part to repair such highway. *Semble.*

INDICTMENT against the parish of Whitney for the non-repair of a certain highway, part of which, containing in length 374 yards from A. to B., was alleged to be out of repair. At the trial before *Park, J.* at the last Herefordshire assizes, it appeared that, upon an indictment for the non-repair of the same road in 1828, the defendants having first pleaded not guilty, afterwards withdrew their plea, and pleaded guilty. It appeared also, that, within the limits of the part of the road alleged to be out of repair, there was a mill-stream, over which there was a stone arch nine feet broad and five feet and a half above the ordinary level of the water, which was

ordinarily three feet deep, but occasionally, in consequence of rain, much deeper. The bridge appeared by a date on the key-stone to have been built in 1762. There were no *parapets*, nor was there any protection on either side. Surveyors, who were called on the part of the prosecution, and who described the state of the bridge and of the road adjoining it, said, that the arch was a *culvert* and not a *bridge*, because it had no *parapets*. It was contended, on the part of the defendants, that this was a public *bridge*, which, with the approaches, the *county*, and not the *parish*, were liable to repair. This was denied on the part of the prosecutor. It was also contended by the prosecutor, that the record of the conviction in 1828 was conclusive evidence of liability, on the part of the parish, to repair the whole road, including the bridge, between the limits included in that indictment. These two questions being argued before the learned judge, and put to him as questions for his decision, his lordship said, "I should say, that the question, as to whether this is a bridge, or not, is a question for the jury; but if you throw it upon me, I should say that it was a culvert, and such a culvert as the county are not bound to repair. If I am to say that such a thing as this is part of the road, I am of opinion that it is. You have a right to move it, if you like. I think you have concluded yourselves by the indictment of 1828." The only question left to the jury was, whether the road was out of repair, and they, being of opinion that it *was* so, found the defendants guilty.

*Talfourd*, Serjt. now moved for a new trial, on the ground of misdirection. The learned judge, upon the evidence of the surveyors, who said that the arch was a *culvert*, and not a *bridge*, because there were no *parapets*, decided that it was a culvert, and that therefore the

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First point.  
Culvert,—or  
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county were not bound to repair. The liability of the county cannot depend upon any artificial distinction which surveyors may make. In *Rex v. The Inhabitants of Oxfordshire* (a) the Court decided that the question of bridge or no bridge was a question of law. [Patterson, J. The Court in that case only decided that there can be no bridge where there is no *cursus aquæ*.] The question, whether the mere fact of a bridge having no parapets can make this arch not a bridge which the county are bound to repair, must be a mere question of law. It is submitted that this was a county bridge, notwithstanding the want of parapets.

Second point.  
Former conviction.

Then, with regard to the judgment by default upon the indictment of 1828, it was contended that this was conclusive evidence of liability on the parish to repair all that lay between the termini of the road indicted; and that, therefore, the parish cannot now say that any part of the intervening road was repairable by the county only. The learned judge adopted this argument, but the point was not ultimately material, by reason of the decision against the defendants upon the other point. It cannot be correct to say that the judgment by default was *conclusive* evidence of liability to repair all the road specified in the indictment. The liability of the parish to repair a road arises by prescription. This is not conclusive evidence of prescriptive liability. [Lord Denman, C. J. It is evidence that you have treated the bridge as part of the public road.] That may be so; but it is not *conclusive* evidence of that fact. Supposing that the judgment was conclusive evidence of liability to such an extent as would support a conviction, yet it was not conclusive evidence of liability to repair the whole of that which is specified in the indictment. The only authority, to shew that a judgment by default upon

(a) 1 Barnw. & Adol. 289.


an indictment for non-repair of a highway is for all time conclusive evidence against the parish, is a note of Mr. Serjt. *Williams* to 2 *Saunders*, 159 c, citing *Rex v. Townshend*(a), which, however, is not exactly in point. Such a rule would be highly dangerous, as it would have the effect of putting great power in the hands of the legal advisers of the parish for the time being.

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LORD DENMAN, C. J.—I think that there is no ground for granting this rule. If the judge had laid it down as a *point of law*, that no bridge without a *parapet* could be such a bridge as the county would be liable to repair, his ruling would have been wrong. It is impossible to say that the mere absence of parapets can prevent a bridge from being such a bridge as the county are liable to repair; nor, on the other hand, can it be said, that the mere fact of an *arch* passing over a *stream* is sufficient to constitute a bridge so as to charge the county. But the question, whether this particular arch was a county bridge or not, appears to have been left to the judge, and he decided it as a question of fact, not of law. The question having been put to him, I see no objection to his deciding as he did. There must be an arbitrary power somewhere, either in the jury or the judge, to say whether a particular arch is a county bridge or not. The learned judge laid down no point of law. With regard to the question as to the judgment by default, when the learned judge said, “I think you have *concluded* yourselves by the indictment of 1828,” he appears merely to have adverted to it as a strong fact.

LITLEDALE, J.—If the learned judge had said that the absence of parapets to a bridge deprived it of the character of a county bridge, I should have thought he

(a) 1 Douglas, 421.

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was wrong. But he laid down no such rule. And, with regard to what he said about the former indictment, I apprehend that he did not say that, *in point of law*, it was *conclusive*.

PATTESON, J.—I am of the same opinion. With regard to *Rex v. Oxfordshire (a)*, I do not understand that case as laying down that every *arch* thrown over a *cursus aquæ* is a bridge, but only as deciding that, in order to constitute a bridge, there *must be* *cursus aquæ*.

COLERIDGE, J. concurred.

Rule refused.

(a) *Suprà*, 58.

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The 9 Geo. IV. cap. 40, s. 38, does not authorize a *retrospective* order for the maintenance of a lunatic.

An order under that Act, stating that the party (who was not settled in the parish in which he was found,) was *so far disordered in his senses that it was dangerous*

*for him to be permitted* to go abroad, and that the justices *have* adjudged that his settlement is in a particular parish, was held sufficient, although the form given in the schedule to the Act was not pursued, and the order contained no words of *present adjudication*.

IN November, 1832, *Henry Beaumont* was removed to the house of *Joshua Burgess*, licensed for the reception of insane persons, by the following order:—

“To the overseers of the poor of the parish of Barrow-upon-Soar, in the county of Leicester.”

“Whereas *Henry Beaumont* of Barrow-upon-Soar aforesaid, who is deemed to be insane, and who hath been wandering about and at large there, hath this day been brought before us, *C. M. Phillips* and *C. W. Parke* Esquires, two &c., pursuant to an order under our hands and seals for that purpose: And thereupon we the said justices, having called to our assistance *S. Eddowes*

surgeon, and, upon examination had of him the said *H. Beaumont*, are satisfied that he is so far disordered in his senses that it is dangerous for him to be permitted to go abroad; and, having made inquiry into the circumstances and place of the last legal settlement of the said *H. B.*, we have adjudged that his said settlement is in the parish of St. Nicholas, in the borough of Leicester:—You are therefore directed to cause the said *H. B.* to be conveyed to the house of *J. Burgess*, of Great Wigston, in the said county, duly licensed for the reception of insane persons. Given &c., 29th November, 1832.”


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On the 2d November, 1834, an order, directed to the overseers of St. Nicholas, Leicester, was made by the same justices; which, after reciting the mandatory part of the former order, proceeded as follows:—

“ And whereas it appears to us the said justices, that the said *H. Beaumont* was, pursuant to our said order, forthwith conveyed to the house of the said *J. Burgess*, where he now remains. We, therefore, do hereby order and direct that you, the overseers of the poor of the parish of St. Nicholas aforesaid (the legal settlement of the said *H. Beaumont* being adjudged to be in your said parish), do and shall pay the weekly sum of 18s. unto the said *J. Burgess* for the maintenance, medicine, and care of the said *H. Beaumont*, during so long a time as the said *H. Beaumont* hath been and shall be under the care of the said *J. Burgess*, the said *J. Burgess* being willing to accept such weekly sum, and which appears to us to be a reasonable charge in that behalf. Given, &c.”

These two orders having been removed by certiorari, and a rule nisi having been obtained for quashing them,

*Hildyard* now shewed cause. Two objections are made to the first order, and one to the second order.

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To the order of November, 1832, it is objected, in the first place, that it does not *formally* adjudicate in what parish the settlement of the pauper is; and, secondly, that it does not pursue the form given by the statute. And to the order of November, 1834, it is objected that it is *retrospective* (a).

(a) By 9 Geo. 4, c. 40, s. 38, "upon its being made known to any justice of the peace of any county, that a poor person, chargeable to any parish or place within such county, is deemed to be insane (either by notice from the overseer of such parish or otherwise), it shall be lawful for the said justice, by an order under his hand and seal (if he shall so think fit), to require the overseer of the poor of the said parish or place to bring the said insane person before any two justices of the peace of the said county, at such time and place as shall be appointed by the said order, and the said justices are hereby required to call to their assistance a physician, surgeon, or apothecary, at the charge of the said parish or place; and if, upon view and examination of the said poor person, or from other proof, the said justices shall be satisfied that such poor person is insane, the said justices shall make inquiry into the place of last legal settlement of such insane person; and it shall be lawful for them (if they shall so think fit), by an order, under their hands and seals, directed to the said overseer of the poor, *according to the schedule (5) annexed to this act*, to cause the said poor person to be conveyed to, and placed in,

the county lunatic asylum, and if no such county lunatic asylum shall have been established, then to some public hospital, or some house duly licensed for the reception of insane persons; and it shall be lawful for the said justice, or any other two justices of the peace of the said county, from time to time, as occasion may require, to *make order* on the overseer of the parish or place wherein such last legal settlement shall be adjudged to be, *for the payment of all reasonable charges of conveying* such poor person to such county lunatic asylum, public hospital, or licensed house; and if such poor person shall be conveyed to such county lunatic asylum, or public hospital, for the payment of such weekly sum to the treasurer of such county lunatic asylum, or proper officer of such public hospital respectively, as shall be from time to time fixed upon b; the visitors of such county lunatic asylum, or as may be required by the regulations of such public hospital, or if such poor person shall be conveyed to such licensed house, for the *payment of such weekly or monthly sum* to the keeper of such licensed house, for the maintenance, medicine, clothing, and care of such poor person, as such keeper shall be

ices are authorized to have a poor person, chargeable to any parish, who is deemed insane, brought before them, and if they are satisfied that such person is insane, they are to inquire into the place of the last legal settlement of such insane person, and they are authorized, *by order according to the form in schedule 5 (a) annexed to the act*, to cause him to be conveyed to some house licensed for the reception of insane persons. Now, as No. 5 of the schedule is silent as to the *adju-*

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to accept, and as shall be referred to the said justices to be made a charge in that behalf.

Section 44, "upon its being known to any justice of the peace that any person wanted without and at large within the jurisdiction, is deemed to be a person chargeable to the parish, it shall be lawful for such justice, by an order under his hand and seal, if he shall so think fit, to require the constable, or churchwarden and overseers of the poor of the parish or place where such person is found, or some of them, to bring the said person before the said justices of &c. at such place as shall be appointed by the said order; and the said justices are hereby required to call to their assistance a physician, surgeon, or apothecary, chargeable to the said parish or place, and, if upon examination the person is deemed to be insane, upon other proof, the said justices shall be satisfied that such person is so far disordered in his mind that it is dangerous for him to be permitted to go abroad, the said justices shall make inquiry

into the circumstances and place of last legal settlement of such insane person; and it shall be lawful for such justices to proceed in such case in the same manner as has hereinbefore been directed in the case of a person chargeable to any parish within the jurisdiction of the said justices."

(a) *Form of Warrant.*

"Whereas it appears to us — of his majesty's justices of the peace for the county of —, having called to our assistance — a physician, or surgeon, or apothecary, (as the case may be,) that —, chargeable to the parish of — in the said county, is lunatic, insane, or a dangerous idiot, (as the case may be); you are hereby directed to cause the said — to be conveyed to the county lunatic asylum, established at —, or to the house of —, situate at —, in the county of —, the said house being a house duly licensed for the reception of insane persons. Given under our hands and seals this — day of —.

To the overseers of the poor }  
of the parish of —." }

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*dication of settlement.* It says nothing as to what is to be the *result* of the inquiry into the *settlement* of the pauper. The language of the former act, 5 Geo. 4, is different from the present statute, 9 Geo. 4, in this respect. The 5 Geo. 4, c. 71, s. 3 (a), required the justices to adjudge the settlement of the pauper. The 9 Geo. 4 omits the words requiring a statement of the adjudication. All that it requires is, that the order shall be made on the officer of the parish in which the pauper is found to be settled. No formal words of adjudication are requisite. As to the second objection; the form given in the act is pursued so far as the circumstances of the case would allow.

Second point.  
Deviation  
from form of  
order given in  
schedule to  
the act.

Third point.  
Order retro-  
spective.

With regard to the objection to the second order; *Rex v. Maulden* (b) certainly decided that so much of an order of this description as was *retrospective* was bad, and that it was good for the residue. But that decision turned on the words of 5 Geo. 4. The words of the 9 Geo. 4 do not require that the order shall be prospective only. By section 38, any two justices are authorized from time to time, as *occasion may require*, to make an order on the overseers of the parish in which the insane person shall be adjudged to be settled, for the payment of all reasonable charges of conveying the poor insane person to the lunatic asylum, or licensed house, and, if he shall be conveyed to such asylum, &c., may make an order for the payment of a weekly or monthly sum for the maintenance, &c. of the poor insane person. This enactment appears evidently to contemplate the creation of a power in the justices to make orders for the payment of expenses *previously* incurred on account of the poor insane person. Under 5 Geo. 4, c. 71, the same magistrates who adjudicated the settlement, must make the

(a) Repealed by 9 G. 4, c. 40. S. C. 8 Barn. & Cressw. 78; 1

(b) 2 Mann. & Ryl. 146; Nev. & Man. Mag. Ca. 380.

order of maintenance, and the order for payment is to be made *forthwith*. But according to 9 Geo. 4, an order of maintenance *may be made from time to time by any two justices*. By sect. 42 of 9 Geo. 4, c. 40, where the settlement of the lunatic has not been ascertained, any two justices may make an inquiry as to his settlement, and if satisfactory evidence can be obtained as to such settlement, may make an order upon the overseer of the parish where *such settlement of such insane person shall be adjudged to be*, for the repayment of the charges of maintaining the insane person, *incurred within twelve calendar months* previously to the date of the order.

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*Archbold*, contra. As to the objection to the second order; the 42d section of 9 Geo. 4, c. 40, only applies where the settlement of the lunatic was not ascertained in the first instance. Here, it appears that the settlement was ascertained previously to the making of the order. The 38th section is the only clause applicable to this case, and in that section the whole mode of proceeding is comprised. All that that section authorizes the justices to do is, to fix a sum to be paid *in future* to the keeper of the lunatic asylum. It does not authorize the justices to make a *retrospective* order. [Lord Denman, C. J. intimated that the Court were satisfied that the order was bad for this reason.]

The first order is bad, because it is not in the form (a) prescribed by No. 5 of the schedule to 9 Geo. 4. [*Cole-ridge, J.* Suppose a party is neither a lunatic, nor insane, nor a dangerous idiot, in what form ought the order then to be made? The 44th section appears to suppose a *fourth* case.] The warrant must either contain an adjudication, or be in the form given by the act. The form


(a) See *ante*, p. 63, note (a).

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of proceeding in the 38th section must be pursued. From the judgment of Lord *Tenterden* in *Rex v. Maulden*, it would appear that he considered it necessary that the order should contain an adjudication; and it was held, that the words "having adjudged" (which the order in that case contained) were, under the circumstances, used in the sense of "do adjudge." [Lord *Denman*, C.J. That was the answer which Lord *Tenterden* gave to that case. It does not follow that he would have considered an adjudication essential if the words "having adjudged" had been omitted.]

LORD DENMAN, C. J.—It appears quite plain from the terms of the act, and from the judgment of Lord *Tenterden* in *Rex v. Maulden*, that a *retrospective* order cannot be supported; because by the act of parliament the power is only given to make an order for *future maintenance*. But with regard to the first order, there is, in my opinion, no valid objection to it. It proceeds on the 44th clause, which enacts, (his lordship here read section 44, which see *ante*, 63.) The justices are authorized to proceed in the same way with regard to the persons to whom that section relates, as had been directed by the 38th section. Now, according to s. 38, which refers to the schedule No. 5, there are only three descriptions of persons, viz. persons who are lunatic, insane, or dangerous idiots, for whose maintenance an order is authorized to be made; and the 44th section introduces a new description, viz. a person so far *disordered in his senses*, that it is dangerous for such person to be permitted to go abroad. In such a case section 44 requires the order to be made in conformity with the form given in the schedule No. 5, which is referred to by section 38. As section 44 requires the order to be made according to the form in the schedule, it must ne-

essarily introduce into the meaning of the words of the form that new description of persons. The order in this case does not say, in the precise language of the form in schedule 5, that the party is a lunatic, insane, or dangerous idiot. Probably it would have been more correct to have introduced that form of words. The form, however, is sufficiently complied with when, in every other respect, the order follows the language of the schedule.

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LITTLEDALE, J.—I am entirely of the same opinion. By section 44, (which relates to persons not chargeable, whereas section 38 relates to poor persons chargeable to any parish), this person is brought within the jurisdiction of the justices; for it appears that he was a person wandering about and at large, and deemed to be insane, and not chargeable to any parish, and that he was brought before the justices, and was found to be so far disordered in his senses that it was dangerous for him to be permitted to go abroad. The justices are also to inquire as to the settlement of the party. This they have done. By section 44, therefore, the justices have jurisdiction, and they are to exercise that jurisdiction in the manner therein pointed out. An objection is made to the form of the order, but it exactly pursues the form given in schedule 5, except where that form is adapted to a person who is lunatic, insane, or an idiot.

PATTESON, J.—I am of opinion that the rule must be made absolute, so far as regards quashing the *prospective* part of the second order. The first order appears to me to be good. The objection to the first order, as to the adjudication of settlement, is answered by Lord *Tenterden* in *Rex v. Maulden*. We must construe the words "have adjudged" as if they were "do adjudge."

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Second point.

With regard to the objection as to the *form* of the order, we must look at section 38 coupled with section 44. It is evidently intended that, when a party, deemed insane, is wandering abroad, the justices should proceed in the manner pointed out in section 38, and that the form of order should be such as would apply to the circumstances of the case. In the form given in the act, the words "as the case may be" are inserted after the words "lunatic, insane, or idiot." I do not mean to say, that if the order, in this case, had used the word "insane," it would not have been good. Looking at section 44, the legislature seem to have used the words "a person being so far disordered in his senses that it is dangerous for him to go abroad" as a definition of the insanity; for section 44, after directing an examination whether a person is so far disordered in his senses, that it is dangerous for him to be permitted to go at large, goes on to say, that the justices shall make inquiry into the settlement of such *insane person*.

Third point.

As to the *retrospective* part of the second order, *Rex v. Maulden* is directly in point, and this cannot be distinguished from that case.

First point.

COLLIERIDGE, J.—I am of the same opinion. Two objections have been made to the order of November, 1832; of which the first is, that it does not follow the form in the schedule in the act. If the words of section 44 are examined, it will be found that there is nothing there said which makes that necessary. The act only directs that the parties shall proceed in the same manner before directed, in the case of a person chargeable to any parish. Then, when section 38 (which applies to persons chargeable) is looked at, the only direction there is, that *it shall be lawful* for the justices to make an order according to the form in the schedule, not that

are *always* to make use of that form, but they are the order *according* to that form. It never can be contended that the very words of the form are to be

The form states that the person is chargeable to parish, without any restrictions with reference to the section. It never could be the intention of the statute, that a form untrue in fact should be used. The form in the schedule contemplates persons lunatic, insane, and idiots. A person not fit to walk abroad is insane, but the 44th section, in my opinion, applies to a different class of persons from those described in section 38. The first objection, therefore, cannot be maintained.

The other objection is, that there is no adjudication of settlement. The first order is not directed to the parish to which the person is *to be removed*, but to the officers of the parish where the party is *found*. The words "have adjudged" may be construed to mean "do judge;" but surely if these words could not bear this meaning, yet as the section does not direct in what manner or when, or where, an adjudication of the settlement is to be made, it would be quite sufficient for the justices to say "we *have* adjudged" that the settlement is in a particular place.

The justices quite agree that the second order is bad, in so far as it is retrospective.

Second order quashed, so far as relates to payments in respect of a by-gone period.

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Second point.

Third point.

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## The KING v. CLARKE and another.

A collector of taxes has no right to take a constable or other person with him into the house of a party, of whom he is about to demand the payment of arrears of taxes, and to levy a distress for such arrears, if necessary,—unless he has reasonable ground for apprehending that an assault will be committed on him, or that the distress will be resisted.

Where, however, *A.*, a collector, unwarrantably, but without any objection being made,

introduces *B.*, a constable, into the house of *D.*, a person from whom he demands taxes, and afterwards, reasonable ground to apprehend violence arising, the collector introduces *C.*, another constable, upon whom *D.* commits an assault; it is no answer to an indictment against *D.* for the assault on *C.* in the execution of his duty, that the collector had wrongfully introduced *B.*

A collector demands taxes due, from *D.*, the owner of a house, and intimates that, in case of non-payment, he shall distrain; upon which *D.* threatens *A.* with personal violence, but ultimately promises to send the amount on a certain day. This promise not being performed, *A.* goes again to *D.*'s house, and demands the taxes of *D.* *D.* leaves the room in which *A.* is, and fastens the outer-door:—Held that *A.* was justified in unfastening the door and introducing constables. And held that, upon *D.*'s returning into the room, after the introduction of the constables accompanied with a number of men, and commanding *C.*, one of the constables whom he knew to be such, to leave the house, it was the duty of *C.* and the other constables to remain.


A collector of taxes may distrain without having his warrant with him, *semble*.

*RICHARD CLARKE* and *Thomas Austin* were indicted for an assault upon *Francis Grinder*, a constable of the parish of Southbersted, in Sussex. The first count charged the defendants with assaulting *Grinder* whilst in the execution of his duty as a peace officer. The second was for a common assault on *Grinder*. The indictment, which was found at the Sussex January sessions, 1834, was, at the instance of the defendants, removed into this Court by certiorari, and was tried before *Gaselee, J.* at the Sussex Spring assizes, in 1835. It then appeared, that one *Tipper*, who was the collector of the land and assessed taxes for the parish of Southbersted, applied, on 28th October, 1834, to the defendant *Clarke*, for payment of 8*l.* 2*s.* 2*d.* for arrears of land tax due from him. *Tipper* was accompanied by *Collim*, a constable. When they had entered *Clarke's* house, which was a public-house, *Tipper* said he came for the land tax. Upon this *Clarke* said "I suppose if I do not pay you will distrain;" to which *Tipper* assented. *Tipper* then demanded 8*l.* 2*s.* 2*d.*, as arrears of land tax, and likewise remarked, that a sum was due for assessed

taxes. *Clarke* then said, that if *Tipper* touched any thing, he would split his skull. *Tipper* replied, that he was not much afraid of that. *Clarke*, who had a whip in his hand, then said, that if *Tipper* and *Collins* did not go away, he would “*bundle*” them out, and desired them to call on the following Saturday; but ultimately he said he would send his son on the following Saturday with the money. It was not, however, sent on that day, and *Tipper*, who in the meantime had had an accident, did not call upon *Clarke* again until the 29th of November. On this occasion he took *Collins* with him, and likewise desired *Grinder* and *Holder*, two other constables, to accompany him, lest any violence should be attempted. *Tipper* and *Collins* entered the house, and *Grinder* and *Holder* remained at a short distance. Upon *Clarke*’s appearing, *Tipper* said he came for the land-tax. *Clarke* went out of the parlour into the passage and fastened the outer door with a chain, and then went into the interior of the house. *Tipper* heard the noise made by *Clarke* in fastening the door, and desired *Collins* to open it, and let in *Grinder* and *Holder*, which was done accordingly. *Clarke* shortly returned with eight or ten men, amongst whom was *Austin*. *Clarke* asked *Tipper* what “that thief-catcher” *Grinder* wanted there? *Tipper* answered, that he had come to aid and assist him. *Clarke* then said, he would not pay whilst *Grinder* remained in the house, and ordered *Austin* to turn him out. *Austin* seized *Grinder* by the collar, and dragged him to the door. A scuffle took place, and ultimately *Clarke* paid the money, and the parties separated. The learned judge told the jury that the question, whether the defendant assaulted *Grinder* in the execution of his duty, must depend upon the construction of 38 Geo. 3, c. 5; for, if *Grinder* was not lawfully in *Clarke*’s house, the defendants were entitled to an

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acquittal. The learned judge said, that in the event of there being a verdict of guilty, he gave the defendants leave to move to set that verdict aside, and enter a verdict of not guilty; and his lordship desired the jury to consider whether the constables, *Collins, Grinder, and Holder*, were taken by *Tipper*, the collector, under a reasonable anticipation of violence, or merely to annoy *Clarke*. The jury found the defendants guilty, and that the constables were taken under a reasonable anticipation of violence. In the early part of this term, *Andrews*, Serjt., obtained a rule nisi to set aside the verdict of guilty, and enter a verdict of not guilty; against this rule,

*Platt* and *G. F. Jones* now shewed cause. The rule was obtained on the ground that the constable was not acting in the execution of his duty, and that consequently the assault was justifiable. The constable was performing the duty which was imposed on him, not only by the statute 38 *Geo. 3*, c. 5, but also by the common law.

First point.  
 Constable justified in entering, under 38 *Geo. 3*, c. 5.

Section 17 of 38 *Geo. 3*, c. 5 (a), enacts, that if any person shall *refuse or neglect* to pay any sum of money

(a) " And whereas doubts have arisen, touching the authority of collectors to distrain for non-payment of the land-tax under the warrants usually granted by commissioners at the time of their appointments, be it further enacted and declared, that if any person shall refuse or neglect to pay any sum or sums of money, whereat he or she shall be rated or assessed by this act, upon demand by the said collector or collectors of that place, according to

the precepts or estreats to him or them delivered by the said commissioners: that then, and in all and every such case and cases, it shall be lawful for the said collectors, or any of them, and they are hereby authorized and required, to levy the sum assessed, by distress and sale of the goods and chattels of such person so neglecting or refusing to pay, or distrain upon the messuages, lands, tenements, and premises, so charged with any such sum or

due for the land-tax, the collectors may levy the sum assessed by distress and sale of the goods of the person refusing to pay. The section then directs that the goods shall be appraised and sold, and provides that it shall be lawful for the collector, by warrant under the hands of two of the commissionours, to break open any chest, box, or other thing, where any goods are, "calling to their assistance the constables, tithing-men, or headboroughs within the counties, ridings, cities, towns, or places, where any *refusal or neglect* shall be made." Then come these words, which evidently override the whole section, "which said officers are hereby required to be aiding and assisting on the premises, as they will answer the contrary at their peril." It is contended by the defendants, that these words refer only to the power previously given, of breaking open chests; but it is evident, from the circumstance of these words being placed at the end of the section, that this was not the intention of

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sums of money, without any further authority from the commissioners for that purpose: and the goods and chattels then and there found, and the distress so taken, to keep by the space of four days, at the cost and charge of the owners: and if the said owners do not pay the sum or sums of money so rated or assessed within the said space of four days, then the said distress shall be appraised by two or more of the inhabitants where the same shall be taken, or other sufficient persons, and shall be sold by the said collectors for payment of the said money, and the overplus coming by such sale (if any be) over and above the tax and charge of taking and

keeping the said distress, shall be immediately returned to the owners thereof; and moreover, that it shall be lawful to break open, in the day-time, any house, and, upon warrant under the hands and seals of any two or more of the said commissioners, any chest, trunk, box, or other thing, where any such goods are, *calling to their assistance the constables, tithing-men, or headboroughs* within the counties, &c. where any refusal or neglect shall be made; *which said officers are hereby required to be aiding and assisting in the premises*, as they will answer the contrary at their peril." And see *Ward v. Const.* 10 Barn. & Cressw. 635, and 5 Mann. & Ryl.

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the legislature, but that its object was, that in *all* cases where, in the words of the act, "any refusal or neglect shall be made," the assistance of the constables may be required for the purpose of distraining, if necessary. Section 40 of the act shews that the legislature contemplated the interference of the constables, since that section enacts, that where land or a house is unoccupied and no distress can be found, the collector *or constables* may enter, at a subsequent period, and distrain.

Second point.  
Entry of constable justified at common law.

II. The constable was justified *by the common law* in accompanying the collector, and entering *Clarke's* house. It is found by the jury that the collector reasonably anticipated that there would be a breach of the peace. That is good ground at the common law, for the interference of a constable. This resembles the case of the swearing in of special constables by magistrates, when they apprehend a tumult. The moment special constables are sworn in, they may interpose to prevent a breach of the peace, and whilst stationed in any place for that purpose, they are deemed in law to be in execution of their duty, though no breach of the peace should eventually take place.

Third point.  
Common assault.

III. There is a count for a common assault, and the verdict upon that count is clearly sustainable.

*Andrews*, Serjt. and *Long*, in support of the rule.

First point.

I. The collector and constable were not acting in pursuance of the *statute* 38 Geo. 3, c. 5, since the collector did not produce his warrant to distrain, nor was there any refusal on the part of *Clarke* to pay the land-tax. The first act which *Tipper* ought to have done was to produce his warrant. [*Patteson*, J. The collector has a general warrant to distrain, and every one knows that the collector *has* such a warrant.] Where a collector attempts to enforce payment by means of a

distress, he ought to have his authority for so doing with him. There was no *refusal* on the part of *Clarke*. *Tipper* was the collector of the assessed taxes as well as collector of the land-tax; and he mentioned to *Clarke* that there was a sum due for the assessed taxes. He did not specifically *demand* the sum due for the land-tax and therefore there could not be a *refusal*. A constable is not authorized, *by virtue of his office*, to levy a distress, nor does the law authorize a party to call in a constable for that purpose. The statute merely authorizes the collector to call the constables to his aid when chests or boxes are to be *broken open*; and for this purpose the collector must have a specific warrant. At all events, the construction to be put upon the statute in this respect is doubtful. If a statute, which gives an authority to a party not possessed by him at common law, is ambiguous, the authority will not be extended by construction.

II. It may be conceded, that, in *some* cases, the collector would be justified in taking a constable with him; not so in this case, as no distress was made. It is said that the collector had reason to apprehend *violence*, from what took place upon the occasion of his first visit. A constable is not warranted in interfering upon a mere *suspicion* that the peace may be broken; nor was there any ground for apprehension from what occurred upon *Tipper's* first visit, since *Tipper* said he was not afraid, and *Clarke* then promised to pay the sum due for the land-tax. If *Tipper* had apprehended violence, and wished to be protected, that object would have been gained by placing the constables *near* the house, without introducing them *into* the house.

Lord DENMAN, C.J.—The first question in this case is, whether this was an assault committed by the two

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defendants, *Clarke* and *Austin*, on *Grinder*, in the execution of his duty. *Grinder* was a constable, and was brought to the premises of *Clarke* by a tax-gatherer named *Tipper*. *Tipper*, having before repeatedly called for the taxes due from *Clarke*, and payment not having been made, had gone to *Clarke's* house on the 28th October, when he was asked whether he did not mean to distrain, and he replied he might find it his duty to do so. He was then told, that if he touched any thing, a violent injury would be inflicted on him. *Clarke* promised to send the taxes to him within a short time. *Tipper*, on the 29th November, went again to *Clarke's* house, accompanied, as before, by *Collins*. On neither of these occasions does any objection appear to have been taken to his being so accompanied. He also took with him two other constables, named *Grinder* and *Holder*, but did not introduce them into the house at first. When *Tipper* had entered *Clarke's* house, and had said that he had come for the taxes, *Clarke* fastened the door on him, and kept him and *Collins* within the house. Now what right *Clarke* had to do that, it is impossible to discover. He had no right to imprison *Tipper* and *Collins* there; and I think that *Tipper* had very just ground of apprehension from this act, and from the language that had been used on the occasion of his first visit, that violence was still intended. Then *Collins* opens the door and introduces *Grinder* and *Holder*. In the meantime, several persons at the public house (very possibly drinking there, and not unlikely to join in acts of violence) were brought by *Clarke* to the spot. The two constables were brought in by *Tipper* (the jury have so found) with a real apprehension on his part that mischief might arise, and not for any purpose of annoying the party from whom the taxes were due. *Clarke* then says that he will pay no taxes while those *thief-catchers* remain,

and he orders *Austin* to turn *Grinder* out of the house, and says that he will stand by him and see that he does not suffer by it. The question is, whether *Grinder* was not at that time *in the execution of his duty as a constable*. I must own that I cannot entertain *any doubt whatever* but that he was. I think that the collector, having met with the treatment which he before experienced, was perfectly warranted in calling in the constable, and that the constable would have *deserted his duty* if he had quitted the place voluntarily. He would certainly have left the collector exposed to very considerable danger, and he had been brought there to prevent the mischief and assault that was extremely likely, under the circumstances, to take place.

The *statute* does not appear to me to be applicable to this case. On the ground of the general duty of the constable, and the general right of every person, in the execution of a public duty, to have the protection of the law, I think that *Tipper* was perfectly justified in taking *Grinder* there by way of precaution; that *Grinder* did not come into the house until it was proper that he should do so; and that he would not have been justified in voluntarily leaving the house at the time when the defendant thought proper with strong hand to eject him.

LITLEDAL, J.—I am of opinion that this verdict must be sustained. (His lordship here recapitulated the facts of the case, and proceeded):—I think that *Tipper* was fully justified in taking the constables with him and letting them into the house. There was a reasonable apprehension of violence on his part; and I am quite satisfied that the constables were lawfully in the house for the purpose of aiding and assisting in the prevention

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of a breach of the peace, and that the defendants were both, in point of law, guilty of an assault.

PATTESON, J.—I am also of opinion that the verdict must be sustained upon the first count of this indictment; but I do not found my opinion on the provisions of the *statute*, because I think it quite clear that this act, so far as relates to calling in the aid and assistance of a constable, relates only to a case in which it is necessary to break open chests or boxes, and where the collector has a special warrant. I think the presence of the constable was justified by the conduct of *Clarke* himself. When applied to in October he refused to pay the money; and upon being given to understand that a distress must be made, he uses very violent language, and threatens that if a single thing is taken away he will break the collector's skull. It is true that the collector answers that he is not afraid of that,—because he does not suppose the man will carry his threat into effect. Ultimately, on this occasion he agrees to send the money on a certain day. He does not, however, send the money on that day; and, some time after, the collector applies again for the money. It does not appear that he then intended to distrain in the first instance; for he demanded the taxes again—meaning, of course, to follow up this demand by a distress, *if necessary*. He took with him *Collins*, a constable, which I think he had no right to do either in November or in October. A tax-collector has no right to introduce a stranger into the house of a person from whom taxes are due, unless there be some *resistance*. He has no right to take any person he thinks fit along with him into the house. But no objection was on either occasion made to *Collins's* being in his house; and no other person was taken by

he collector into the house when he first entered it on the 29th November. It is true that two other constables accompany the collector, but he leaves them outside the door to be ready there in case their assistance should be necessary, should any violence be attempted, which he had reason to apprehend. When *Clarke* is called on for the money, he leaves the room apparently for the purpose of getting it. I will take it to have been so. But when he is out of the room, *Collins* and *Tipper* hear a noise as if *Clarke* was fastening the outer door, and in his absence *Collins* goes to see whether that is the fact. He finds that the outer door is fastened. That circumstance justified *Tipper* in supposing that violence was intended, for if *Clarke* intended to pay the money peaceably, he had no occasion to fasten the outer door. In order to protect *Tipper* and himself from that violence, *Collins* opened the door and let in the two other constables whom *Tipper* had brought for the purpose of protecting him from any violence. So far *Tipper's* conduct appears to have been quite correct. *Clarke* returns, not alone, but accompanied by ten or twelve men, and finding *Grinder* and the other constable in the room, he says, having those ten men at his back, "turn that man out, or I will not pay the money." If the constable had gone out and left the collector unprotected, *Clarke* would probably, when the door was shut, have overpowered the collector and would have paid nothing. The constable, however, as it seems to me, very properly refuses to leave the room, but stays to protect *Tipper*. What does *Clarke* do? Instead of paying the money and bringing an action against the constable for coming into the house, if he thought he could succeed, he orders him to be turned out. It appears to me that the constable was in the performance of his duty, and that an assault was

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committed by the defendants, which comes within the first count.

COLERIDGE, J.—I am quite of the same opinion. The short question is, whether *Grinder*, at the time when the assault took place, was *lawfully* in *Clarke's* house, and *lawfully persisting to stay* in that house. If he was, and if the lawfulness of his stay there arose out of any part of his duty as constable, then undoubtedly this verdict may be sustained on the first count of the indictment. I am of opinion that he was *clearly justified* both in being there and in persisting to stay there; and I say that, laying aside entirely all the special authorities given by the statute; for I do not think that the case is at all brought within the statute. *Tipper's* character as collector was well known:—he was authorized to collect. He was authorized to distrain without the production of any special warrant. As his authority arose out of a general warrant applicable to all cases, and granted at the time when he was appointed collector, I do not think that he was bound in each individual case to have that warrant with him, or to produce it. However, no demand was made of a warrant, and there was no doubt at all about his character. He had been there in October. Some conversation had then taken place about an intention to distrain, upon which very strong and improper language had been made use of by *Clarke*. The answer which the collector gave, I do not think imports exactly that he believed the threat would not be carried into execution. It seems to me the natural answer of defiance which a peace officer would give. The answer is, “I shall not be deterred;”—“I am not afraid of your threats;”—“I shall do my duty.” However, *Tipper* goes away upon a promise of payment being made. A

whole month elapses, during which time no payment is made by *Clarke*. When the collector went again, was he not justified in providing himself with the means of enforcing a distress, or preserving the peace, in case a distress, supposing it to become necessary, should be resisted? I think that he was so. He walks into the house with *Collins*. That is not objected to. The other two persons, one of whom is *Grinder*, are stationed outside in the most inoffensive manner. The bolting of the door by *Clarke* was an unjustifiable act; and it was not until that act was done, that *Grinder*, the person on whom the assault was committed, was introduced. Then *Grinder* and *Holder* are introduced. When they come into the room, *Clarke* returns thither with ten men. This is the state of things which *Grinder* finds when he is in that room. There is then a conversation about payment,—there is language used about *Grinder*, calling him a thief-taker;—which I only mention for the purpose of shewing that they knew who *Grinder* was, and what character he filled;—and then *Grinder* is ordered to withdraw. Now then, I ask, whether, at that moment, *Grinder*, as a peace-officer, without reference to any other circumstance, had not justifiable cause for *staying* in that place? His conduct was peaceable; he had entered peaceably after an unjust act was done,—he finds ten men present there, and in strong language he is called on to retire. I think that if he had retired under those circumstances, he would have been wanting in his duty; and that if *Grinder*, *Collins*, and *Holder* had gone out, and afterwards any violence had been committed on the collector, they would all have been chargeable with a very great neglect of duty. Then if that be so, *Grinder* was justified in *being there*, and he was justified in *persisting to stay there*; and his justification arose out of his special character as peace-

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officer. That being so, this verdict is properly sustainable on the first count of the indictment.

Rule discharged (a).

(a) The sentence of the Court in the penalty of 100*l.* to keep the peace for two years; and that *Austen* should pay a fine of 40*s.*  
was then pronounced by *Little-  
dale, J.*, which was, that *Clarke*  
should pay a fine of 50*l.*, and  
enter into his own recognizance

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An office in a parish, to which the officer may be appointed for any discretionary period, is not an annual office within 3 & 4 *W. & M.* c. 11, s. 6, and 9 & 10 *W.* 3, c. 11.

Therefore a man in fact appointed to and serving such office for a year, and residing within the parish, cannot gain a settlement thereby.

Where, in case of a general appointment to an office, such appointment will enure as an appointment for a year, the office is an annual office within those statutes.

AN order whereby *M. C. Yarwood*, his wife and children, were removed from the township of Church-Hulme to the township of Middlewich, both in Cheshire, was confirmed by the sessions, subject to the following case:—

Both townships support their own poor. The pauper, two years before the date of the order, being then settled in Middlewich, was duly appointed, under the Cheshire Constabulary Act, 10 *Geo.* 4, (local and personal acts,) c. xcvi. (b), assistant-petty-constable for

(b) Intituled "An act to enable the magistrates of the county palatine of Chester to appoint special high constables for the several hundreds or divisions, and assistant-petty-constables for the several townships, of that county."

Sect. 1 provides for the appointment of high constables.

Sect. 2 enacts, that the justices for the county, at any quarter-sessions, may—on the recom-

mendation of the justices acting for any hundred or division in the county, assembled in petty-sessions within such hundred or division, not being less than three—from time to time, appoint a proper person, duly qualified, as thereafter mentioned, to be an assistant-petty-constable for any one township, or for two or more adjoining townships within such hundred or division, for such pe-

fourteen townships in the county of Chester, of which Church-Hulme was one; and, under that appointment, he served the office for upwards of fifteen months,

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*riod as the said justices, at any quarter-sessions, shall think expedient (except as thereafter mentioned;) and that, upon any vacancy in the office of any such assistant-petty-constable, by death, resignation, efflux of time, or otherwise, the justices at any quarter-sessions may, on the like recommendation, appoint another proper person to be an assistant-petty-constable in the place of the person making such vacancy. Proviso, that no assistant-petty-constable appointed under that act shall resign his office until he shall have given to the justices at petty-sessions one month's notice of his intention so to resign.*

Sect. 4 requires every assistant-petty-constable to take an oath that *while he continues to hold the said office*, he will, to the best of his skill and knowledge, faithfully discharge all the duties thereof.

Sect. 5 enacts, that such assistant-petty-constable shall have, throughout the whole county, all the powers, authorities, privileges, advantages, and immunities, until legally removed from his office, as any constable has at the common law—and shall be subject to the same penalties for misconduct or neglect of duty.

Sect. 8 enacts, that every assistant-petty-constable to be appointed under this act, shall be liable to execute all the duties

which by law do or shall belong to a constable of a township.

Sect. 10 enacts, that the justices at quarter-sessions may remove any assistant-petty-constable for any misconduct or incapacity, or in case they shall at any time think that the necessity for the continuance of such an officer has ceased.

By sect. 11, the magistrates in petty-sessions are empowered to suspend any assistant-petty-constable, and appoint another in his place until the next quarter-sessions. And the justices at quarter-sessions are directed to reinstate or remove the officer so suspended, as they shall think proper.

By sect. 19, the justices at quarter-sessions are authorized, at the recommendation of the petty-sessions for any hundred or division, to order a salary for each assistant-petty-constable appointed under this act, for any township or townships within such hundred or division, provided that *such salary shall in no case exceed the annual sum of 20l. for each township.*

By sect. 20, the justices in petty-sessions are authorized in certain cases to order, for any assistant-petty-constable, in lieu of the salary thereinbefore authorized to be ordered for him, any salary not exceeding 50l. per annum.

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during the whole of which time he resided in Church-Hulme.

The question for the opinion of the Court is, whether the pauper gained a settlement in Church-Hulme by serving an office in consequence of such appointment, service, and residence? If he did, the order of sessions is to be quashed, if otherwise, to be confirmed.

*Waddington*, in support of the order of sessions. It is not found that the pauper was appointed *for a year*. Therefore it is sufficient, on behalf of the respondents, to shew that, under the authority of the Cheshire Constabulary Act, the appointment *might* have been *for less than a year*. On the part of the appellants it must be contended that *of necessity* the appointment must have been for a year. Section 2 of the act gives the justices at quarter sessions power to appoint assistant-petty-constables "*for such period as they shall think expedient, except as thereafter mentioned;*" that is, subject to the powers given by a subsequent section, to suspend and to remove for incapacity or misconduct, or in case the justices shall at any time think that the necessity for the continuance of such an officer has ceased. So that the appointment may be originally for *any* period of time, however short, *at the discretion* of the justices; and is, moreover, to be *subject to a power of removal* in several cases, one of which is, where the justices *in their discretion* shall think the continuance of the office no longer necessary; and subject also, as appears by other sections, to the right of the petty constable himself to *resign* after one calendar month's notice of his intention, given to the justices at any petty sessions. Although in some respects this petty constable is placed upon the same footing as a constable at common law, yet, as regards the present question, there is absolutely

no analogy between the two cases. The oath of an ordinary constable is always that he will duly execute his office during *one year*. Here, the oath is, that *while he continues to hold* the office, he will faithfully discharge the duties thereof. [Lord Denman, C. J. I do not see why it should be called an *annual*, any more than a *weekly*, office.]

He was stopped by the Court.

*Evans*, contra. This question was not raised at the sessions. It was taken for granted that the appointment, which was produced, was *general*. [Lord Denman, C. J. Would not a *general* appointment be bad? Must not the justices appoint for a time *certain*?] It is apprehended that the appointment might be *general*. The act gives a *yearly* salary, which would make a *general* appointment enure as an appointment for a year at the least. In *Rex v. Lew (a)* it was held, that a party who, having been duly appointed *assistant overseer* for a parish at an annual salary, serves the office for a year, during which time he resides in such parish, gains a settlement. It was held sufficiently to appear that the office was an annual office, from the fact of the salary being annual. [Lord Denman, C. J. In that case the pauper was in fact appointed *for a year*. The yearly salary was fixed at 10*l.* on the appointment.] So here, the salary is by the authority of the act of parliament *annual*. [Coleridge, J. The act does not authorize the justices to order *an annual salary*, but only to order *a salary*, which, it is afterwards provided, is not in any case to exceed a certain annual sum. *Littledale*, J. The enactment means that the justices may order a salary, *at the rate* of not more than a certain annual sum, to be paid to the officer. *Coleridge*, J. Would

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an appointment for three months be bad? Certainly not. Then, can it be contended that an officer so appointed must have an *annual salary*? The enactment clearly means *at the rate* of so much a year.] It is not essential that an office should be limited in its duration to a year, for a parish clerk and sexton, though appointed generally, gain a settlement in respect of the service of their office. There was, in this case, a service of fifteen months. The appointment should, in the absence of all other evidence, be taken to have been co-extensive with the duration of the service under it.

Lord DENMAN, C. J.—If this office had been in its nature an *annual office*, we should have liked to have seen the *appointment* itself. But we think that the office is not in its nature *annual*, but that it is one to which the party may be appointed for *any* period which the justices may, in their discretion, think fit. *Rex v. Lew* appeared to me at first to be an answer to this difficulty; for it seemed to me that the office of *assistant overseer*, (which in that case was held sufficient,) was not in its nature an annual office any more than that of the assistant-petty-constable here. But I now think that for two reasons that case is quite distinguishable. An *assistant overseer*, when appointed, is to continue to hold his office *until he resigns, or his appointment is revoked*; and his salary is to be a “yearly salary.” His office is, like that of a common overseer, *annual*. And in *Rex v. Lew*, the party was appointed *generally*, and at a *yearly salary*. In this case the duration of the office is in the discretion of the justices, and therefore, I think that even if the justices had, in their discretion, appointed the pauper’s father for a year, his

service of the office would not have been sufficient, because the office is not in its nature annual.

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LITLEDALE, J.—I am of the same opinion. This case differs from *Rex v. Lew*. The office in that case was, that of an assistant overseer, who is appointed under 59 Geo. 3, c. 12, s. 7, by which the inhabitants of any parish in vestry assembled are authorized to nominate and elect any discreet person to be an assistant overseer, and to determine and specify the duties to be performed by him, and to fix such yearly salary for the execution of the said office as they shall think fit; justices are authorized to appoint, by warrant, according to the nomination and election; and the person so appointed is to continue to be an assistant overseer until resignation or revocation of his appointment. Then inasmuch as the office of *overseer* of the poor is an annual office, the office of *assistant overseer* must be taken to be such also, though subject to resignation and revocation. Here, however, there is quite a different state of things, for by the words of the act of parliament the original appointment ought to specify the time for which the officer is appointed. This, therefore, is not an annual office.

PATTESON, J.—I am of the same opinion. *Rex v. Lew* is perfectly distinguishable. An appointment for an assistant overseer for a period less than a year would not be valid. Here, the officer might be appointed for a week.

COLERIDGE, J.—I also am of the same opinion. If the office had been in its nature annual, I should have said that the case ought to go down to the sessions in order that the actual appointment might be brought to

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our notice. But I think that even if it could be shewn that the party was appointed *for a year*, that would not be sufficient, because the office is not in its nature annual. There is nothing in the act to make it an annual office. An office is *annual* where, if an appointment be made *generally*, it might be legally intended to have been *for a year*.

Order of Sessions confirmed.



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A hiring under which the servant is to work ten hours a day, from five in the morning to six in the evening, and to leave off in the middle of the day on Saturday, so as to make up the ten hours a day, is an "exceptive hiring."

AN order, whereby *John White*, his wife and children, were removed from the parish of Norton-Bavant, Wiltshire, to the parish of Frome-Selwood, Somersetshire, was quashed, subject to the following case:

The pauper's birth-settlement was in Frome-Selwood. About eight years ago the pauper went to one *Gutch*, in the parish of Corslay, to hire himself as a colt shearman. *Gutch* asked the pauper if he liked to work for him for a twelvemonth, and offered 4s. a week, to work ten hours a day, from five o'clock in the morning till six in the evening, and to leave off in the middle of the day on Saturday, so as to make up the ten hours a day. The pauper served the year, and slept in the same parish, sometimes at his master's, and sometimes at home. About a month after entering into the service, it was agreed between the master and the pauper that the latter should receive one penny per hour for over-hours; and he continued to receive the same to the end of the year. Sometimes he looked after his master's horse, and sometimes worked in the garden. At the end of the year the pauper agreed with the master to stay on upon the same terms, with the addition of six-

pence a week more wages. The pauper served a second year, doing nearly the same work as before. The pauper during both years worked over-hours, at his master's request, and never refused when he was wanted. He was sometimes employed on Sundays, and was paid for so doing. The pauper kept an account of his over-time, by the direction of his master, and was asked by his master if he would sooner do the over-work in his own time, or in his master's. The pauper chose to work his over-hours in the evening. The question for the Court is, whether the pauper gained a settlement by hiring and service in Corslay; if so, the order of sessions is to be confirmed; if not, then quashed.

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*Bingham*, in support of the order of sessions. The sessions have, by quashing the order of removal, in effect found an actual or implied hiring for a year in Corslay. This Court will not disturb that finding; *Rex v. St. Andrew, Cambridge* (a), *Rex v. Rosliston* (b), *Rex v. St. Martin, Leicester* (c). In *Rex v. Ardington* (d), the Court seem to have somewhat relaxed the rule laid down in the three preceding cases, but of those cases only one (the first) was there cited. In *Rex v. Dunsford* (e), in which the question was, whether a particular excavation was a *mine* or not, the Court held that it was a question of fact upon which the sessions, and the sessions only, could decide.

But the principal question here is, whether the hiring in this case was *exceptive* or not. There have been very numerous decisions as to where a hiring is *exceptive* and where not, from which it is impossible, as

(a) 3 Mann. & Ryl. 374, and  
 8 Barn. & Cressw. 664; 2 Mann.  
 & Ryl. Mag. Ca. 19.

(b) 3 M. & R. 420, 8 B. & C.  
 668; 2 Mann. & Ryl. Mag. Ca. 37.

(c) 3 Mann. & Ryl. 377, and  
 8 Barn. & Cressw. 674; 2 Mann.  
 & Ryl. Mag. Ca. 22.

(d) 1 Adol. & Ell. 260.

(e) *Ante*, ii. 524.

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the Court once observed, to deduce any *principle*. The last case, which is *Rex v. Ossett-cum-Gawthorpe* (a), is precisely on all-fours with this case; or, if there be any difference between the two cases, *Rex v. Ossett-cum-Gawthorpe* is the stronger of the two. The only facts in this case, which tend at all to shew that the hiring was exceptive, are facts which occurred *after the hiring*, and which appear to be a mere regulation of the amount of the wages. *Rex v. Byker* (b) is also precisely like the present case.

*Barstow*, *contra*. With regard to the preliminary objection:—It is clear that the sessions have sent up the contract for the opinion of this Court. It must be tried by the ordinary test, whether this is an exceptive hiring or not. The contract, to be a complete hiring for a year, must give the master *dominion* over the servant for one whole year. The contract here, as originally made, gave the master power over the servant only during certain hours of the day; and if he had required the servant to do over-work, the servant might, consistently with the contract, have refused;—he might have answered, that he was free after a certain hour of the day, and after a certain time on Saturday. The work after certain hours was therefore entirely *optional* on the part of the servant. In *Rex v. Birmingham* (c), the pauper was hired for a year, by a button caster, at Birmingham, at weekly wages, to work from six in the morning until seven at night, and he was at liberty to make as much over-work as he chose. Nothing was said respecting Sundays, but during the service, if there was any thing to be done on Sunday, he always did it.


(a) *Ante*, vol. i. 10; 1 Nev. & Mann. 21; and 4 Barn. & Adol. 216.

(b) 2 Barn. & Cressw. 114,

and 3 Dowl. & Ryl. 330.

(c) 4 Mann. & Ryl. 691, and 9 Barn. & Cressw. 925; 2 Mann. & Ryl. Mag. Ca. 402.

The pauper served for a year, and did over-work, for which he was paid extra. Upon the argument, the case of *Rex v. Byker* was cited, as has been done here; but Bayley, J. there says (a), "This is a very different case from *Rex v. Byker*. A service of more than fourteen hours a day was clearly contemplated there, and the Court thought that the time was mentioned merely as the *measure of wages*; that the contract did not impose *any limits* upon what might reasonably be required by the master, and that the relation of master and servant subsisted during the whole twenty-four hours. Here, the stipulations are, that the servant shall receive fixed wages; that he shall work from six in the morning till seven in the evening, and that he may make as much over-work *as he chooses*. But he could not have been *compelled* to make any over-work. He had a right any and every evening to say to his master, "I have worked thirteen hours to-day, and I will work no more till to-morrow." This is clearly an exception in the contract, limiting the contract of the master over the servant to thirteen hours a day."

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LORD DENMAN, C. J.—I think it impossible for us to say that we are bound by the decision of the sessions. The sessions have found that there was a birth-settlement in the appellant parish, and a subsequent settlement by hiring and service in the respondent parish, *provided* this Court is of opinion that the hiring which they have stated amounts to a hiring for a year. The Court is therefore bound to inquire whether it is such a hiring or not.

We should find it very difficult to reconcile all the cases which have been decided as to *exceptive hirings*. This case is, however, precisely governed by *Rex v.*

(a) 4 Mann. & Ryl. 694.

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*Birmingham*, for the facts are quite the same. *Bayley, J.*, in that case, distinguishes it from *Rex v. Byker*, which had been cited. Here the master asked the pauper if he liked to work for a twelvemonth, and offered 4s. a week to work ten hours a day, from five o'clock in the morning till six in the evening, and to leave off in the middle of Saturday, so as to make up the ten hours a day. There was a part of the week during which the pauper was not bound to work for his master. That which took place after the original agreement forms no part of the contract. We are pressed with the authority of *Rex v. Ossett-cum-Gawthorpe(a)*. In that case we did not intend to overrule *Rex v. Birmingham*:—on the contrary, it is expressly mentioned and distinguished in the judgments. The distinction between the two cases, is, I admit, a refined one, and one of our learned brothers(b) thought that we were wrong. *There*, however, the contract certainly was different from that upon which the question turns *here*. In that case there was a *general hiring* for five years stated, and then followed *certain arrangements* as to the amount of the wages. Here the *actual contract* of hiring itself is to work for ten hours a day only. Therefore, without interfering with any of the decisions referred to, we may hold that this is an *exceptive hiring*.


LITLEDALE, J.—I am of the same opinion.

PATTESON, J.—I also am of the same opinion. I do not think that the sessions can be said to have found that this was a hiring for a whole year; for they have asked us to decide whether it is so or not. We distin-

(a) *Suprà*.

(b) *Taunton, J.*

guish between *Rex v. Birmingham* and *Rex v. Ossett-cum-Gawthorpe*. In that latter case I was not much pressed by *Rex v. Birmingham*, but was more so by *Rex v. Frome-Selwood* (a). The question, whether a contract of hiring is exceptive or not, depends upon whether over-work is *optional* or not, on the part of the servant. In *Rex v. Ossett-cum-Gawthorpe* it was *not* optional. We all agreed there as to the principle, though we differed as to the facts. *Here* the over-work is optional.

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COLERIDGE, J.—It is quite trifling to say that there has been any finding by the sessions which can prevent our going into the inquiry whether this is an exceptive hiring or not. They leave the question entirely open to us.

There is, no doubt, a difficulty in reconciling all the cases upon this subject, but at the same time there is no class of cases in settlement law on which the *principle* is better settled. The difficulty arises from the courts having, upon the same facts and the same principles, come to different conclusions. It would have been better if the sessions had found, upon the settled principle, that the hiring was exceptive or complete for a year. The principle being settled, is it possible for any one who reads this case, without referring to other decisions upon the subject, to doubt that this is an exceptive hiring. During all the time beyond the stipulated hours the pauper was his own master. He might have gone away, and have worked wherever he would. This was clearly an exceptive hiring. That which came after the original contract in this case, shews what was the understanding of the parties. A distinction was then

(a) 1 Barnw. & Adol. 207.

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acknowledged by them between master's time and servant's time.

Order of Sessions quashed.

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No settlement is gained by the execution of an office (e. g. that of pinder,) for a town, to which the party is appointed at a court held within and for a manor, which manor does not extend over the whole town, and there being no special custom warranting such appointment.

AN order, whereby *John Porter*, his wife and children, were removed from the parish of Fordham, Cambridge-shire, to St. Mary, Newmarket, Suffolk, was quashed, subject to the following case:

The pauper never gained any settlement in his own right. The pauper's father being settled in the appellant parish, went to reside in the respondent parish under a certificate; and whilst so residing, served there for two years the office of pinder, to which he was appointed at a court-baron, held for the manor of Fordham-Biggen, on 5th September, 1787; the appointment being entered on the court rolls in the following words:

"And lastly, the said homage did elect *John Porter* pinder for the town of Fordham, for the year ensuing, and until another person be chosen in his stead; and the said *John Porter* came into court, and was sworn duly to execute the said office."

The first entry on the court-rolls of this manor, which can be found, of the appointment of any officer, is at a court baron, held 1st November, 1693. From that period to the year 1810, (when the parish of Fordham was inclosed,) there were four courts-leet with courts-baron, and a great majority of courts-baron without a leet (a),

(a) *Quare*, whether an appointment at a court-baron of a public officer, even for the manor only, could be supported by cus-

at which the pinders and other officers of the manor were appointed and sworn in. In the instances of courts-leet and courts-baron being held together, (save one, where the pinder was appointed by the homage only,) the pinder and other officers of the manor were elected by the jury of the leet.

From 1739 to 1794 there were eight consecutive courts-baron, at which certain persons were, in like manner as the pauper's father, elected pinders by the homage and sworn in, and there is not one instance on the court rolls of any such appointment at a court-leet, held as such only. There are in all five manors in the respondent parish, of which the manor of Soham-and-Fordham is the most extensive, but there is no paramount manor. Previously to the inclosure of the parish there were three commons in the manor of Fordham-Biggen, over which the inhabitants of Fordham had common rights. There were also two pounds; one belonging to the manor of Fordham-Biggen, the other to the manor of Soham-and-Fordham.


The question is, whether the pauper's father was legally placed in the office of pinder under the above appointment, so as to confer upon him a settlement in the respondent parish.

The above case was, in pursuance of a writ of certiorari, transmitted to this Court, and was, by an order of this Court on 5th May, 1832, sent back to the sessions, in order that they might inquire whether the *town* of Fordham was co-extensive with the *parish* of Fordham, and was more or less extensive than the *manor* of *Fordham-Biggen*.

com; and, *quare*, whether what is here called a court-baron may not have been a customary court, viz. the court of the copyholders,

and not properly a court-baron, which is the freeholders' court? See 5 Mann. & Ryl. 143 (a).

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And at the Court of Quarter Sessions, held 6th April, 1833, the said Court found that the *town* of Fordham was co-extensive with the *parish* of Fordham, and was more extensive than the *manor* of Fordham-Biggen. And it *confirmed* the said order of removal.

*Biggs Andrews*, in support of the order of sessions. The Court, on a former occasion, said that if the town of Fordham were co-extensive with the parish of Fordham, and were more extensive than the manor of Fordham-Biggen, the appointment of the pauper's father would clearly be bad; and, because these facts were not sufficiently stated in the case, it was sent back to be restated. The *homage*, at a court-baron of one manor, cannot legally appoint a pinder for a parish or town, in which there are contained several other independent manors. Indeed, there appears to be no authority to shew, that a court-baron can appoint *any officer* whatever. An *office* must be derived immediately or mediately from the crown. Therefore, though a *court-leet* may appoint an officer, a *court-baron* may not do so. If a pinder be an *officer*, he cannot, therefore, legally be appointed at a court-baron; if he be not, then a party can gain no settlement in respect of his performance of his duties as such officer. A pinder, especially where appointed at a court-baron (which is a private Court), is, at all events, not a "*public annual officer in a parish*," within 3 *W. & M.* c. 11, s. 6, and 9 & 10 *W. 3*, c. 11 (a).

LORD DENMAN, C. J.—Mr. *Kelly*, can you maintain

(a) The 3 *W. & M.* c. 11, speaks of "a *public* annual officer or charge in any town or parish;" but in 9 & 10 *W. 3*, c. 11, which

applies specially to *certificated* persons, the word "*public*" is omitted.

this position, that the homage of one manor can appoint a pinder for a parish containing several other manors?

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*F. Kelly* and *J. Smith*, *contra*. There may be a custom to that effect, and such a custom would be good. No such custom is *stated*, but the existence of such a custom may be collected from the facts which *are* stated in this case. It should have been left to the sessions to find whether there was a custom, or not. It is prayed that the case may again be sent back to the sessions, in order that this point may be ascertained. [Lord *Denman*, C. J. It is clear that the Court, on the former occasion, thought the facts which have now been found, upon sending back the case to be restated, would be decisive of the case; and we think so too. It is a great pity that it was not then conditionally decided.] It must be admitted that, unless there be a custom to warrant it, the appointment is illegal. [Lord *Denman*, C. J. I admit that it is not necessary that a man should be appointed to an office extending over the whole parish, but if he be appointed to the whole parish, he must shew that he has been *legally* appointed to the whole parish.]

*Per Curiam*.

Order of Sessions confirmed (a).

(a) And see *Scriven*, Copyh. 3d ed. 867.

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All persons whose property derives any advantage from the works of the commissioners of sewers, may be assessed to the sewers-rate in respect of that property.

And property drained by sewers and drains originally made and always repaired by persons independent of the commissioners of sewers, and deriving no immediate benefit from the works of such commissioners, may be assessed by reason of the general benefit and advantage resulting from such property becoming thereby accessible, and of its approaching and neighbouring public ways being properly drained and cleansed.

Held, that apartments in Somerset House, appropriated to the office of the commissioners for auditing the public accounts, are ratable by the commissioners of sewers for the city and liberty of Westminster, and parts of Middlesex, although Somerset House is declared by act of parliament to be vested in the crown, free from all incumbrances, for the purpose of establishing within the same that amongst other public offices.

By 52 Geo. 3, c. xlviii. s. 7, all persons are liable to be rated to the sewers-rate, as occupiers of premises ratable thereto, who are *de facto* rated in respect of such premises to the poor-rates of the parishes to which that act applies.

**TRESPASS**, by the clerk of the minutes to the commissioners for auditing the public accounts, against a bailiff to the commissioners of sewers for the city and liberty of Westminster and part of the county of Middlesex, for taking and distreining a table. Plea: the general issue.

The case was not brought to trial, but after issue joined, the parties, by consent and by order of *Littledale, J.*, stated the following case, for the opinion of this Court, and agreed that a judgment should be entered for the plaintiff or for the defendant, by confession or by nolle prosequi, immediately after the decision of the case, or otherwise, as the Court might think fit.

The office of the commissioners for auditing public accounts is in the eastern wing of Somerset House, which is in the parish of Saint Mary-le-Strand, in the city and liberty of Westminster, and in the district of the eastern division of the Westminster Sewers.

By 15 Geo. 3, c. 33, s. 16, Somerset House, with all its rights, members, &c. was declared to be vested in His Majesty, His heirs and successors, *free from all incumbrances* whatever, for the purpose of erecting and establishing within the same (amongst other public offices in the said act enumerated) the *office of auditors of the imprest*.

By 25 Geo. 3, c. 52, the office of auditors of the impost was determined, and the office of the commissioners for auditing the public accounts was established in its place. The plaintiff is the principal clerk to the commissioners in that office.

Neither the commissioners for auditing the public accounts, nor the plaintiff, reside in the audit office, nor is there any room or place in the said office fitted up for the purpose of residing or dwelling therein. The attendance of the commissioners and of the plaintiff at such office, is only from ten o'clock to four, for the purpose of discharging the duties of their respective offices. The persons who sleep on the premises appropriated to the office of the said commissioners, are the office-keeper and one of the messengers attached to the office, who inhabit three sitting-rooms, five bed-rooms, two kitchens and offices, two pantries, a small passage-room, a beer-cellar, and a wash-house. The commissioners, the plaintiff, and the messenger, are paid by salaries; but no deduction is made from the salary of the commissioners or of the plaintiff, in respect of the use made by them of the said office, nor from the salary of the said messenger in respect of his sleeping therein. The case then set out the statute of sewers, 23 Hen. 8, c. 5, s. 3 and s. 9(a), and the statute 3 & 4 Edw. 6, c. 8(b).

(a) The statute of sewers, (23 Hen. 8, c. 5,) reciting "that great damages and losses have happened in divers parts of the realm, as well by reason of the outrageous flowing, surges, and course of the sea, in and upon marsh-grounds &c. heretofore won and made profitable, as also by occasion of land-waters and other outrageous springs, in

and upon meadows, pastures, and other low grounds, adjoining to rivers, floods, and other watercourses, and over that by and through mills, mill-dams, wears, fish-garths, kedells, gores, gotes, floodgates, locks, and other impediments in and upon the same rivers and watercourses," authorizes (sect. 1) the directing of commissions of sewers in all

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Under Somerset House there are drains and sewers, originally made by the authority of His Majesty's Board

parts of the kingdom, from time to time, where and when need shall require, according to the form given in sect. 3 of the act. Commissioners are to be assigned to be justices to survey the walls, streams, ditches, banks, gutters, sewers, gotes, calcies, bridges, trenches, mills, mill-dams, flood-gates, ponds, locks, hebbing-wears and other impediments, lets, and annoyances, and the same to cause to be made, corrected, repaired, amended, put down, or reformed, as the case shall require, at their discretions;—and also to depute and assign keepers, bailiffs, surveyors, collectors, expeditors, and other officers, for the safety, conservation, reparation, reformation, and making of the premises, and to hear the account of the collectors and other ministers of and for the receipt, and laying out of the money that shall be levied and paid in and about the making &c. of the said sewers, &c., to distrain for the arrenrages of every such collection, tax, and *assess*, as often as shall be expedient, or otherwise to punish the debtors and detainers of the same by fines &c.”

Section 9 provides, “that the same laws, ordinances, and decrees to be made and ordained by the said commissioners, or six of them, by authority of the said commission, shall bind as well *the lands, tenements, and*

*hereditaments of the king, our sovereign lord, as all and every other person and persons, and their heirs, for such their interest as they shall fortune to have or may have in any lands, tenements, or hereditaments, or other casual profit, advantage, or commodity, whatsoever they be, whereunto the said laws, ordinances and decrees shall in any wise extend, according to the true purport, meaning and intent of the same laws.”*

(b) And by 3 & 4 Edw. 6, c. 8, it is enacted, that the act of 23 Hen. 8 shall continue in force, to be observed and kept for ever, in such manner and form as shall and may stand with the sequel and additions thereafter mentioned.

Sect. 2 enacts, “that all sums of money thereafter to be rated and taxed by virtue of such commission of sewers, upon any of the lands, tenements, or hereditaments of the king, his heirs or successors, for any manner of thing or things concerning the articles of the said commission of sewers, shall be gathered and levied by distress or otherwise, in like manner and form as shall or may be done in the lands &c. of any other person. And that all bills of acquittance, signed with the hand or hands of such collector or receiver as shall have the collection thereof, by the appointment of the said com-

*of Works, and at the public expense, which drains and sewers are still under the management and control of the said Board, and are cleansed, repaired, and maintained at the public expense. The drains and sewers under the east wing of Somerset House communicate with the above drains and sewers, and form part thereof, and are west of the city of London, and fall into the River Thames.*

The case then set out the 3 *Jac.* 1, c. 14(a), and the 2 *Will. & Mary*, sess. 2, c. 8, s. 14(b).

missioners, or six of them, shall be as well a sufficient discharge to the tenants, farmers, and occupiers of the same grounds, so to be charged for the said sum wherewith their grounds shall be so charged, as also sufficient warrant to all and every the receivers, auditors, and other whatsoever officer or officers of our said sovereign lord the king, his heirs and successors, for the allowance to such tenant, farmer, or occupier, for the same."

(a) Whereby it is enacted, (sect. 2,) "that the walls, ditches, banks, gutters, sewers, gotes, causeys, bridges, streams, and watercourses, within the limits of two miles of and from the city of London, which waters have their course and fall into the river of Thames, shall from henceforth be, to all intents, constructions and purposes, as fully subject to the commission of sewers, and to all the statutes made for sewers, and to all penalties in the same statutes, and in every of them contained, as if the same places near to the said

city of London had been particularly named in the said statute of sewers, or that therein the water had ebbed and flowed, and therein free passage with boats and barges to the sea had been heretofore used.

(b) Whereby it is enacted, "that all *new sewers* at any time since 12 *Car.* 2, made in any of the said parishes, (within the city and liberty of Westminster, and certain other parishes,) shall be henceforth subject to the commission of sewers, and to the laws and statutes made for sewers, as fully to all intents and purposes, as if such sewers, *sinks and vaults*, had been expressly mentioned in the said statutes of sewers, to be under the survey of the said commissioners; and the commissioners of sewers for the time being, within the limits of their respective commission, shall have power and authority, by virtue of this act, to alter, amend, cleanse, and scour such new sewers, *sinks and vaults*, and to order and direct the making of any other new vaults and sew-

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By 47 *Geo. 3*, sess. 1, c. vii. after reciting the above acts of *James* and 1 & 2 *Will. & Mary*, it is enacted, "that all sewers, west of the city of London, extending to and including a certain watercourse, part of which divides the parishes of Chelsea and Fulham, and including the several parishes within the city and liberty of Westminster, and the precincts of the same, west of and extending to Temple Bar, and also including certain other parishes out of the city and liberty of Westminster, and all sewers and drains communicating with the same watercourses, or with any of the ancient sewers comprised within the limits prescribed by the act of 3 *Jac. 1*, or with any of the sewers mentioned or comprised in the said act of 2 *W. & M.*, which sewers and waters have their course and fall into the River Thames, shall from henceforth be, to all intents, constructions and purposes, as fully subject to the commission of sewers for the city and liberty of Westminster, and part of the county of Middlesex, and to all the statutes made for sewers, and to all penalties and provisions in the same statutes, and in every of them contained; and that the same commissioners and their officers, and all persons acting by their authority, shall have the same powers, authorities, remedies, jurisdiction, &c., as if the said several parishes had been particularly named and described in the several statutes of sewers, or that therein the water had ebbed and flowed, and therein free passage with boats and barges to the sea had been theretofore used."

There is a common sewer running through the square at Somerset House and running under Somerset House,

ers, and to cut into any drain or sewer already made, and to alter and take away any nuisances in the same, and to alter or take

away any cross gutter or channels in all or any of the streets or lanes in the parishes aforesaid."

which was made and is cleansed, repaired and maintained, by the commissioners of sewers for the city and liberty of Westminster; but the drains and sewers under the *eastern wing aforesaid* do not communicate therewith, nor do any of the drains and sewers stated above to have been made, and to be still cleansed, repaired and maintained by, and to be under the management and control of, His Majesty's Board of Works, so that the buildings of Somerset House *derive no immediate benefit from the said drain or sewer of the commissioners of sewers, except the general benefit and advantage of being accessible, and of its approaches and neighbouring public ways being properly drained and cleansed.*

The office of the commissioners for auditing public accounts has not heretofore been rated to any sewers-rates, nor has nor have any person or persons, till the rate hereinafter mentioned, been rated in respect thereof.

The commissioners of sewers made a rate in which the plaintiff is rated, in respect of the Audit Office, in the several sums of 11*l.* 11*s.* 6*d.* and 2*l.* 12*s.*, upon a rental of 463*l.* and 104*l.*

By 52 Geo. 3, c. xlviii. s. 7, after reciting that great difficulty had arisen to the commissioners of sewers for the limits aforesaid, in laying an equal rate from time to time upon the several inhabitants within the limits of the said commissioners, occasioned by their not being authorized, under any of the statutes now in force concerning sewers, to call for *and inspect the poor-rates of the several parishes* within the limits aforesaid, it is enacted, "that it shall be lawful for the said commissioners of sewers, for the limits aforesaid, from time to time, as the said commissioners shall see occasion, by an order in writing, to direct the clerk for the time being of the said commissioners, or any other person on their behalf, to inspect or take a copy of the last rate or

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assessment for the relief of the poor of any parish or parishes within the jurisdiction of the said commissioners of sewers, and on production of such order by the clerk of the said commissioners, or other person as aforesaid, to the person entrusted with the custody of the several rates aforesaid, such person shall produce the same forthwith to the said clerk, and permit him to inspect and take a copy thereof from time to time, or otherwise shall furnish, with all convenient speed, to the clerk of the said commissioners for the time being, a true copy of the book of rates of such parish or parishes as aforesaid, in order to enable the said commissioners of sewers to lay an equal rate or assessment on the several inhabitants within the limits of the said commissioners, or any portion thereof."

The commissioners of sewers, by the last-above-recited act, inspected the rate-books of the said parish of Saint Mary-le-Strand, and the plaintiff is therein rated for the relief of the poor of the said parish, in respect of the said premises, at the *yearly rental before mentioned*.

The several sums of 11*l.* 11*s.* 6*d.* and 2*l.* 12*s.*, assessed by the commissioners of sewers as aforesaid, were duly demanded of the plaintiff, and he thereupon refused to pay the same, whereupon by a warrant under the hands and seals of six of the commissioners of sewers for the city and liberty of Westminster, directed to the defendant, he was authorized and required to levy by distress and sale of the goods of the several persons mentioned in a certain schedule annexed to the said warrant, or of any other occupiers of the premises mentioned in the said schedule, opposite to their respective names, the several and respective sums placed against their names in the said schedule, being so much taxed or assessed upon the said premises, for and towards cleansing, repairing, or maintaining certain common sewers, within

the district called the Eastern Division of the Westminster Sewers.

Under the authority of the said warrant, the defendant took and distreined the table mentioned in the declaration, which, at the time of taking thereof, was in the possession of the plaintiff.

By 7 Ann. c. 10, s. 3, it is enacted and declared, "that it shall and may be lawful to and for the commissioners of sewers, or any six or more of them, by warrant under their hands and seals, to give authority to any person or persons to levy the sums of money by them from time to time to be assessed or taxed, upon the lands, meadows, marshes, or grounds, liable or chargeable with any sesses, taxes, impositions or charges, by authority of the commission, by distress and sale of the goods of such person or persons that shall not pay, or shall refuse to pay the same.

If upon this statement of facts the Court shall be of opinion that the offices of the said commissioners for auditing the public accounts are liable to be assessed to the said rate, and that the said commissioners, or the plaintiff, are or is liable to be assessed thereto, as the occupiers or occupier of the said office, then the judgment is to be entered for the defendant, otherwise for the plaintiff.

This case was argued in Hilary term, 1835, by *Rogers*, for the plaintiff, who cited the following authorities. The case of *The Isle of Ely* (a), *Rooke's case* (b), *Cullis's Reading on the Statute of Sewers* (c), *Stafford v. Hamston* (d), *Dore v. Gray* (e), *Masters v. Scroggs* (f), *Rex*

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(a) 10 Co. Rep. 141.

(b) 5 Co. Rep. 99, 100.

(c) P. 121, ed. 1810.

(d) 2 Bro. &amp; Bingham. 691.

(e) 2 T. R. 358.

(f) 3 Maule &amp; Selw. 447.

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*Netherton v. Ward* (b), *Holford v. Copeland* (c).

*Blackburn* argued for the defendant.

The arguments have been omitted, as they are fully noticed in the judgment of the Court.

Lord DENMAN, C.J., in the course of this term, delivered the judgment of the Court, as follows :

This was an action of trespass, for the purpose of trying the validity of a sewers-rate, imposed on the plaintiff as occupier of the Audit Office, in the eastern wing of Somerset House. The plaintiff contended that such rate was improperly imposed on him as occupier, even if it could be imposed at all in respect of that liability, but *that* also he denied. A case was agreed upon, stating the particulars from which the plaintiff's occupation was inferred by the defendant. On the effect of them we do not find it necessary to give any opinion, because the 52 *Geo. 3* gives the power to rate those persons as occupiers, who are *de facto* assessed to the poor-rate, and the plaintiff filling the latter character with respect to the premises, is clothed with the former by the statute referred to.

We are therefore to decide whether the occupier of the audit office is liable to be rated to the sewers in respect of that occupation. The facts on this point were these—that under Somerset House are drains and sewers, originally made by, and still under the management and control of, the Board of Works, at the public expense ; that the drains and sewers under the eastern wing communicate with these and form part thereof ;

(a) 4 Mann. & Ryl. 365; *S.C.*  
 9 Barn. & Cressw. 517.

(b) 3 Barn. & Alders. 21.  
 (c) 3 Bos. & Pull. 129.

that they are west of London, and fall into the Thames; that there is a common sewer running through the square of Somerset House, and under Somerset House, which was made and is repaired by the commissioners of sewers for Westminster, but the drains and sewers under the eastern wing do not communicate therewith, nor do the buildings of Somerset House derive any immediate benefit therefrom, except the general benefit and advantage of being accessible, and of its approaching and neighbouring public ways being properly drained and cleansed.

Though numerous cases were cited in the argument, from *The Isle of Ely case* to *Rex v. Commissioners of Tower Hamlets*, the doctrine laid down in them all is uniform and undisputed, as applicable to the present question. It rests on the principle that every one whose property derives benefit from the works of the commission, may be assessed to the rates they impose. The benefit is not required to be *immediate*, nor do the cases, or the commission itself, or the statutes, say any thing of the nature or amount of the benefit. Possibly that benefit may be so extremely small, that a jury would not have found the fact stated in the case. But on the other hand, the kind of benefit may be of high value; as if a house were inaccessible because surrounded by marshes, and the works of sewage had made those marshes hard and passable. The case does not even state that the amount of rate does not bear a just proportion to the extent of benefit. This may possibly be immaterial; for if the commissioners have *jurisdiction*, this Court will not, in an action of trespass for levying the rates, inquire whether they have correctly exercised their judgment. But as the jurisdiction results from the fact of benefit being derived, and the case expressly states that *some* benefit *was* derived, we think ourselves

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bound by the statement to say, that the defendant had authority to levy the rate, and that he is consequently entitled to our judgment.

Judgment for the defendant.

The KING v. Rev. JOHN NEALE, Clerk.

Where a vicar, after summons to the parish clerk to attend and answer a charge of intoxication, amoves him upon insufficient evidence of the intoxication, the Court will issue a mandamus requiring the vicar to restore the clerk.

*Quere*, whether it would be sufficient ground to amove a clerk, that amongst his neighbours he was notorious as a drunkard, without proof of particular acts of intoxication and indecorum.

If one act of intoxication be relied on, the

intoxication and consequent incapacity of the clerk to perform the duties of his office, when required to do so, should, at all events, be distinctly proved.

**R. V. RICHARDS**, in last Hilary term, obtained a rule, calling upon the Rev. *John Neale*, clerk, vicar of Staverton-cum-Boddington, in the county of Gloucester, to shew cause why a mandamus should not issue, commanding him to restore *George Bowles* to the office of parish clerk and sexton of the said parish, and why he should not pay the costs of this application.

*Bowles* had been charged by Mr. *Neale* with divers acts of intoxication, and was summoned to attend before him to answer the charge. He did not, however, attend, and evidence was given by a gentleman, who stated, that on the occasion of a marriage, *Bowles*, being in attendance in the church, appeared to be fresh in liquor, and unfit to perform the service with decorum. Upon this evidence the vicar amoved *Bowles* from his office. Contradictory affidavits respecting the general conduct of *Bowles* were sworn.

Sir *W. Follett* and *W. H. Watson* now shewed cause. The vicar possessed the power of amotion, after summons of the party and reasonable cause shewn. Here, there was a summons, in pursuance of which the party

might have attended, but as he neglected to do so, the evidence was all one way. Intoxication is clearly sufficient cause for amotion. The vicar was himself the judge of the sufficiency of the evidence to support the charge of intoxication.

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*Maule*, contra. There can be no doubt that the summons was a necessary step; Observation of *Fortescue*, J., in *Rex v. Chancellor, &c. of University of Cambridge* (a). This Court has a right to review the vicar's decision upon the evidence, and it must be shewn that the cause of amotion was substantial, and did not consist of mere slight acts of indecorum or neglect. In *Rex v. Warren* (b) it was held, that if a parish clerk, though appointed by a minister, be removed by him without a sufficient cause, a mandamus will lie to restore him. Lord *Mansfield*, C. J., said in that case, "Though a minister may have power of removing him upon a good and sufficient cause, he can never be the sole judge, and remove him *ad libitum*, without being subject to the control of this Court." And *Aston*, J., said, "As long as the clerk behaves himself well, he has good right and title to continue in his office. Therefore, if the clergyman has any just cause of removing him, he should state it to the Court." Afterwards, the Court, upon reading affidavits which stated that the clerk had become bankrupt and had not obtained his certificate; that he had been guilty of many omissions in the register, was actually in prison at the time of his removal, and had appointed a deputy who was totally unfit for his office, the Court said, "There is no sufficient reason assigned in the affidavits that have been read, upon which the Court can exercise their judgment, nor is

(a) 1 Strange, 566.

(b) 1 Cowper, 370.

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there any instance produced of any misbehaviour of consequence. Therefore the rule for a mandamus must be made absolute." In the Reports of the Admiralty Court, temp. Lord *Stowell*, many cases occur, in which questions arose as to whether sailors had or had not forfeited their wages to acts of *intoxication*, and in no one of those cases was the intoxication held sufficient to deprive the sailors of their wages.

Lord DENMAN, C.J.—I do not think we need enter into further discussion on this subject. I am by no means prepared to say, that if a person had from all his neighbours the character of a notorious drunkard, that would not be a sufficient reason to remove him, without proof of any particular facts; and I am by no means prepared to say that if he had, on any single occasion, been proved to have misconducted himself, through drinking, at the church, that would not have been sufficient cause for removing him; but the only ground on which this charge rests is, that he has been guilty of *divers* acts of intoxication. I think that the least we can expect is, proof of the charge as made. We, sitting here, are to see that these proceedings do not take place without full authority and proof, and that one act of intoxication, at least, has been distinctly and fully proved. I do not find that is so; it is only stated, that in the opinion of a gentleman who was present, the clerk was, on the occasion of a marriage, *fresh in liquor*, and unfit to perform the service with decorum; it is not said he was *unfitted by liquor* to perform the service with decorum; and it is not alleged that any thing like indecorum, or any mistake or impropriety, or any irreverence, which can properly be censured in the conduct of the clerk, was the *consequence* of that supposed freshness in liquor

on that occasion. I think, therefore, that we must call on this gentleman to make a return.

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LITLEDALE, J. and PATTESON, J. concurred.

COLERIDGE, J.—The Court is called on in this case, either by discharging this rule to turn the man out of the office for good, without further inquiry, or by letting the mandamus go, merely to put the matter into train for further inquiry. It is on that ground that I concur with the rest of the Court in thinking that this mandamus ought to go. Three of my brothers have a different opinion from myself, as to the sufficiency of the alleged cause of motion, and that is quite sufficient reason, in my opinion, for the mandamus going.

Rule absolute.

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## DANIEL v. PHILLIPS and DAVIES (a).

In trespass for false imprisonment against two magistrates, the defendants gave in evidence a conviction under 7 & 8 Geo. 4, c. 30, s. 24, of the plaintiff, for "unlawfully and maliciously damaging," &c., a quantity of rushes, for which they adjudged the plaintiff to pay the sum of 10s. as a reasonable compensation, and 6s. 6d. for costs; and, in default of immediate payment, the plaintiff to be imprisoned for one calendar month, unless the said sums should be sooner paid. The warrant of commitment stated the offence to be, that the plaintiff unlawfully trespassed on land in the occupation of D. Thomas, and cut down and carried away a quantity of rushes, for which offence he was ordered to pay the sum of 10s. penalty, and the gaoler was ordered to detain him for the space of one month, or until he should be delivered by the due order of law.—Held, that the conviction sufficiently supported the commitment.

**TRESPASS** for assault and false imprisonment. Plea —Not guilty. At the trial at the spring assizes for the county of Carmarthen, before *Gurney, B.*, it appeared that the defendants were justices of the peace for the county of Carmarthen, and that the trespass complained of was the imprisonment of the plaintiff, upon a conviction under the 24th section of the 7 & 8 Geo. c. 30 (b).

(a) This and the following cases are taken, by permission, from the first volume of Messrs. Crompton, Meeson, and Roscoe's Reports of Cases in the Court of Exchequer.

(b) Which enacts, "That if any person shall wilfully or maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is hereinbefore provided, every such person, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of five pounds; which sum of money shall, in the case of private property, be paid to the party aggrieved, except where such party shall have been examined in proof of the offence; and in such case, or in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in such manner

as every penalty imposed by a justice of the peace under this act is hereinafter directed to be applied; and if such sum of money, together with costs (if ordered), shall not be paid either immediately after the conviction, or within such period as the justice shall at the time of the conviction appoint, the justice may commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, as the justice shall think fit, for any term not exceeding two calendar months, unless such sum and costs be sooner paid: Provided always, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass, not being wilful and mali-

The defendants relied upon the conviction as a defence. *David Thomas*, the party aggrieved, was examined in proof of the offence. The conviction was in the following form :—

“ Be it remembered, that on the 19th day of January, in the year of our Lord 1833, at Carmarthen, in the said county, *Daniel Daniel* is convicted before us, *John Geo. Philipps* and *David Davies*, esquires, two of his majesty’s justices of the peace for the said county of Carmarthen, for that he the said *Daniel Daniel*, on the 31st day of December, in the year of our Lord 1832, at the parish of St. Ishmael, in the county of Carmarthen aforesaid, a certain quantity of rushes, to wit, three cart loads of rushes, of *David Thomas* then and there being, *unlawfully* and *maliciously* did damage and injure, cut and carry, against the form of the statute in that case made and provided. We, the said *John George Philipps* and *David Davies*, the justices of the peace aforesaid, do therefore adjudge the said *Daniel Daniel* for his said offence to forfeit and pay the sum of 10s. as a *reasonable compensation* for the damage and injury so committed by the said *Daniel Daniel* as aforesaid, and also to pay the sum of 6s. 6d. for costs ; and in default of immediate payment of the said sums, to be imprisoned in the house of correction of the said county, and there kept to hard labour for the space of one calendar month, unless the said sums shall be sooner paid. And we, the said justices, do direct that the said sum of 10s. shall be paid to *William Andrews*, of the said parish of St. Ismael, being one of the overseers of the poor of the said parish in which the said offence was committed, to be applied by him according to the directions of the statute in that case

cious, committed in hunting, fishing, or in the pursuit of game ; but that every such trespass shall

be punishable in the same manner as before the passing of this act.”

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made and provided, (*David Thomas*, the owner of the rushes, having been examined in proof of the offence aforesaid). And we order that the said sum of 6s. 6d. for costs shall be paid to the said *David Thomas*. Given," &c.

The warrant of commitment was in the following form :—

" These are to command you, the said constables, and each of you, in his majesty's name, forthwith to convey and deliver into the custody of the said keeper of the said house of correction, the body of *Daniel Daniel*, of the parish of St. Ishmael, in the said county, charged before us with having on the 31st day of December now last past, *unlawfully trespassed* upon lands the property of the Rev. *Edward Picton*, clerk, in the occupation of *David Thomas*, at Rotten Hill, in the said parish of St. Ishmael, and with having cut down and carried away a quantity of rushes, of which offence the said *Daniel Daniel* is convicted before us, and ordered to pay the sum of 10s. *penalty*, and also the sum of 6s. 6d. costs attending the prosecution of the said complaint, which the said *Daniel Daniel* doth refuse to pay ; and you, the said keeper, are hereby required to receive the said *Daniel Daniel* into your custody in the said house of correction, and him there safely keep for *the space of one calendar month*, or *until he thence be delivered by the due order of law*. Given," &c.

Under this commitment the plaintiff was conveyed to prison on the 19th of January, 1833, and remained there until the 21st of the same month, when he was discharged upon the payment of the 10s. and costs. In answer to the defence upon the conviction, the variance between the conviction and the commitment was insisted upon ;

but the learned judge thought that variance cured by the 39th section of the 7 & 8 Geo. 4, c. 30 (a), and, the plaintiff refusing to be nonsuited, directed the jury to find a verdict for the defendants, which they did accordingly. In Easter term last, *E. V. Williams* obtained a rule to shew cause why the verdict for the defendants should not be set aside and a new trial had.

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*Chilton* and *J. Evans* now shewed cause. The position contended for on behalf of the plaintiff is this, that though the conviction be good, the warrant of commitment is bad, and is not supported by the conviction. The principal objection taken was, that the conviction described a different offence to that which was untechnically described in the commitment. But the latter, in substance, describes the offence for which the plaintiff was convicted; and, even if that were not the case, the variance is cured by the 39th section of the 7 & 8 Geo. 4, c. 30, which was expressly designed to meet a case like the present, and to protect magistrates from the consequences of errors merely technical. The commitment here comes within all the terms of that section; for it is alleged that the party has been convicted, and there is a good and valid conviction to sustain the commitment. If it were still necessary that the commitment should strictly pursue the conviction, that clause would be useless, for then there would be no such defects as it mentions, to be cured. [Lord *Lyndhurst*, C. B. Whether the offence mentioned in the conviction and the offence mentioned in the commitment were the same, was a question of fact.] That question was never left to the

<p>(a) Which enacts, "That no warrant of commitment shall be held void by reason of any defect therein, provided it be therein</p>	<p>alleged that the party has been convicted, and there be a good and valid conviction to sustain the same."</p>
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jury. If there had been, in fact, any question as to the offences being distinct, the plaintiff should have had it put to the jury, and should have shewn, by evidence, that they were distinct; but in the absence of any such proof, when a commitment is produced referring to a prior conviction for a similar offence, viz. a trespass committed by the same person, and imposing the same sum, viz. 10s. to be paid by the offender, it must be presumed that the commitment proceeded on the conviction, and that the offence is one and the same. It is then objected to the commitment that it states the offender to have been ordered to pay the sum of 10s. *penalty*, whereas the conviction awarded the sum of 10s. as a *reasonable compensation*, pursuant to the terms of the statute. The mere calling of this sum a *penalty* will not alter the nature of the payment; nor can it be doubted that the sum called a penalty refers to the sum described in the conviction as a reasonable compensation. The payment was, in fact, more in the nature of a penalty than of a compensation, in this case, for it was given to the poor of the parish. The last objection is, that the conviction and commitment vary with regard to the statement of the judgment: the former being, that the offender, in default of payment, shall be imprisoned in the house of correction for one calendar month, unless the said sum shall be sooner paid; and the latter directing the gaoler to keep him in custody "for the space of one calendar month, or until he shall be discharged by the due order of law." In fact, the offender was discharged, according to the provisions of the statute, within two days after his committal, and the words of the commitment are in substance also according to these provisions. Suppose the commitment had only stated the conviction, without mentioning any time, but had simply directed the gaoler to keep the offender in custody until discharged by due

course of law ; such a commitment would not have been any variance from the conviction. How then does the addition of the one month alter it? The act itself directs, that in a certain case he may be detained for the space of one month ; and the commitment says no more ; for it does not direct him to be imprisoned for one month, at all events, “ but for one calendar month, or *until* he be thence delivered by the due order of law.” Now the due order of law is, that he shall be delivered before the expiration of the month, upon payment of the money ; and that condition, therefore, is impliedly contained in the commitment. But here, again, granting it to be a variance, it cannot be taken advantage of since the 7 & 8 Geo. 4, c. 30, s. 39.

*E. V. Williams* and *James*, *contra*. The question before the Court is one of great importance ; for the clause upon which the defendants rely, as curing the defect in the commitment, occurs not only in the 7 & 8 Geo. 4 c. 30, but in the 9 Geo. 4, c. 31, (Lord *Lansdowne's* Act,) and in the 9 Geo. 4, c. 69, (the Game Act;) and it is very material that the operation of that clause should be accurately understood. It will be convenient, in the first place, to consider the defects in the commitment ; and then to examine the question, whether those defects are cured by the 39th section of the 7 & 8 Geo. 4. There is no such offence known in the criminal law as that described in the commitment. No statute gives to magistrates the power of convicting a man for “ unlawfully trespassing” upon lands, the property of another. The statute upon which the conviction proceeded only gives the justices jurisdiction where a person *wilfully* or *maliciously* commits any damage, injury, or spoil to or upon any real or personal property.” The commitment states, that the plaintiff unlawfully trespassed on land in the

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possession of *David Thomas*, and cut down and carried away a quantity of rushes. This is a description merely of a civil trespass to real property: the cutting and carrying away of the rushes being an aggravation of the trespass committed to the realty. But the offence described in the conviction is totally different. Not only does it differ in the nature of the offence, but in the nature of the property to which the injury has been done. It is laid as a *malicious* damage, and the property damaged is described as personal property only, viz. three cartloads of rushes, without any reference whatever to an injury to real property. Now the statute, having mentioned both real and personal property, must be understood as drawing a distinction between the two, and as requiring it to be set forth to which kind of property in particular the damage has been done. Two distinct classes of offences are pointed at by the statute, and the offence described in the conviction belongs to one of those classes, and the offence in the commitment to the other. It is clear, that, unless prevented by the operation of the 7 & 8 Geo. 4, c. 30, s. 39, such a variance would be fatal; *Rogers v. Jones* (a). It is there said by the Court: "The commitment and the conviction do not connect themselves together. A magistrate cannot justify a commitment for one offence by a conviction for another and a different offence." The variance between the two instruments in that instance was less material than in the present case. [*Gurney*, B. There the conviction proceeded upon one statute, and the commitment upon another.] In *Wicks v. Clutterbuck* (b), it is said by *Parke*, J., "Here the magistrate is to get rid of a bad commitment by referring to a previous conviction. In this, perhaps, he might have succeeded, if he

(a) 3 B. & C. 409; 5 D. & R.  
 268, & C. (b) 2 Bingh. 483.

had shewn that the commitment pursued the conviction, and that the conviction was good ; which, for the present purpose, I will assume to have been the case. But the commitment is on a ground totally different from that charged in the conviction ; and how am I to know that there were not two informations against the party ? Besides, the commitment does not state any ingredient of the offence described in the act, nor any offence within the summary jurisdiction of the magistrate ; and it is not enough for us merely to believe that it refers to the conviction, in a matter which ought to be considered so strictly." How did it appear in the present case that the conviction and commitment were not in reality for two different offences ? [Lord *Lyndhurst*, C. B. That was a question of fact for the jury, and ought to have been put to them if it was intended to be insisted upon. But it never was pretended that there was more than one conviction. The commitment refers to a conviction, and it must be presumed that it was to the one in question. *Alderson*, B. The objection would apply to every use of a variance.] The next objection is, that the commitment is for a *penalty*, while the conviction is for *reasonable compensation*. The intention of the statute was, that in these cases the magistrates should exercise discretion as to what shall be paid by the offender, not as a penalty, or punishment of the offender for the act done, but as a reasonable compensation to the party aggrieved by the consequences of that act. In the imposing of a penalty, no such discretion is required, and the two payments are therefore quite distinct in their nature ; and the conviction and commitment contain different judgments, imposing different payments. [Lord *Lyndhurst*, C. B. The form of conviction given by the statute (a) uses the word " penalty : " [or, I adjudge the

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self, in the last term. The facts of the case were these:—The plaintiff was convicted before the defendants on the 19th of January, 1833, under the 7 & 8 Geo. 4, c. 30, s. 24, and ordered to pay the sum of 10s. and costs; and on the refusal by him to do so, he was committed to prison by a warrant of commitment, directed to the constables of the parish of St. Ishmael, and the keeper of the house of correction, under the hands and seals of the two defendants, the material part of which is as follows:—[His lordship here read the warrant of commitment.] A conviction was produced on the trial, of which the following is a copy:—[The learned judge read the conviction.] Several objections were taken to this commitment:—First, that no offence was stated in the recital of the conviction, because, in order to constitute an offence (within the 24th sect. of 7 & 8 Geo. 4, c. 30,) the damage must be *wilfully or maliciously* committed, and there is no statement that the trespass, though unlawful, was wilful or malicious. Secondly, it was objected that the conviction did not support the commitment, for the former was for an injury to personal, the latter to real property. The third objection was, that the commitment was for the non-payment of a *penalty*, while the adjudication of imprisonment in the conviction was for the non-payment of a sum of money *by way of compensation* for the damage: and the fourth and last, that the commitment was void, because it was for a month, or until he be delivered by the due order of the law; and the act authorized a commitment for any term not exceeding two calendar months, not absolutely, but unless the sum ordered to be paid, and costs, should be sooner paid. In answer to these objections, the defendants' counsel relied on the 30th section of the same statute, 7 & 8 Geo. 4, c. 30, by which it is enacted, inter alia, that "no such conviction shall be quashed for want

of form, or be removed by certiorari, &c., and no warrant of commitment shall be held void, by reason of *any* defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction *to sustain the same.*"

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The first of the objections is certainly cured by this clause in the statute, and the second ought not to prevail, because it charges, that the conviction is for the same offence, though in somewhat different language; viz. for the maliciously cutting and carrying away a quantity of rushes; and it proceeds upon the same statute as that on which the commitment is founded; in which respect this case is distinguishable from that of *Rogers v. Jones (a)*, cited at the bar, where the commitment and conviction were for offences against different statutes. As little foundation is there for the third objection; viz. that the commitment is for non-payment of a penalty. The 24th section treats as a penalty the sum awarded by the justices, where the party aggrieved is examined in proof of the offence (and that was so in the present case), for it directs the money to be applied as every penalty imposed by a justice of the peace under that act is thereafter directed to be applied. The objections are therefore reduced to the fourth and last, which is, that the commitment is for a month absolutely, whereas the statute authorizes a commitment for that time, unless the sum ordered to be paid, and costs, be sooner paid. It is clearly settled, that the cause of commitment ought to be certainly stated, to the end that the party may know for what he suffers, and how he may regain his liberty (b). And if it be not, it is not only a ground for discharging the party, but the warrant is void,

(a) 3 B. & C. 409; 5 D. & R. 268, S. C.

(b) *Dr. Groenvelt's case*, 1 Ld. Raym. 213

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And no justification in an action of false imprisonment. *Groome v. Forrester* (a), contrary to the dictum of Lord Holt in *Bracey's* case (b). In the present case, the conclusion of the warrant of commitment is clearly wrong, unless the words, "unless he be released by the due order of the law," are equivalent to the qualification which the statute requires, and which ought to have been introduced, viz. "unless the money should be sooner paid." But that they are not equivalent appears by Dr. *Groenveldt's* case, and by *The Mayor and Churchwardens of Northampton's* case (c), and *Yoxley's* case (d). The case of *Goff* (e) is no authority to the contrary; for there was no uncertainty on the face of the commitment; the adjudication was recited, and was correct; and the Court construed the conclusion of the warrant with reference to the recital in the warrant itself. There is no doubt therefore, in our minds, but that the conclusion of this warrant of committal is wrong, and the commitment void, unless it be aided by the 39th section, above referred to. It is contended by the plaintiff that it is not, because that section has no operation unless two conditions are complied with: first, that it is alleged in the warrant that the party is convicted; and, secondly, that there be a good and valid conviction to sustain the warrant of commitment; and although it is admitted that the first condition is performed, it is insisted that the second is not. And the case appears to us to resolve itself into the question, whether the conviction in this case, which is certainly good and valid on the face of it, does sustain the warrant of commitment within the meaning of the act. On the part of the plaintiff it is contended that it does not, because it is insisted that it

(a) 5 M. & Selw. 314.

(b) Comb. 391.


(c) Carth. 152.

(d) 3 Salk. 351.

(e) 3 M. & Selw. 203.

is necessary that the conviction, in order to sustain the commitment, should authorize that imprisonment which it directs; and this conviction does not. Though it may not be necessary that they should agree in every particular, it is contended that an agreement in this respect is essential; otherwise a commitment might be for ten years, and a conviction adjudging an imprisonment for a month might render the commitment valid for a month. On the other hand, it was argued for the defendants, that all which this clause in the statute requires is, that there should really be a conviction on the face of it good and valid, and that the warrant should be issued on that conviction. We have felt considerable doubt, in the course of the argument and on subsequent consideration, upon this question; but we have come to the conclusion, that the effect of the 39th section is to render this warrant valid. It is perfectly clear that the legislature meant to cure some defects in the warrant by this clause; it is equally clear that, in order to ascertain whether any defects in the warrant are cured, reference must be had to the conviction itself, for the purpose of ascertaining that it is good and valid. Hence it follows, that neither the party to be affected by the warrant, nor those who are to act upon it, can know from the warrant alone (if there be *any* defect on the face of it), whether it is valid or not. There *must* be a reference had to the conviction; and in this respect the clause in question alters the general law, by which the offence and punishment are to be collected from the warrant itself. We cannot help thinking, that the reason why the legislature has made it essential to the cure of any defect in the commitment, that it should state that the party was convicted, is to give those who are to act upon or be affected by the warrant, notice that there is a conviction, and put

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them upon inquiring after the terms of it. If there is to be a reference to the conviction (as there must be), why are we to narrow the beneficial effect of the clause in question, by holding that the reference must be for one purpose, and not for all? Our opinion is, that as both instruments must be looked at by all parties concerned in the validity of the warrant, whenever there is *any* defect in it, *both* are to be read together, and to be held explanatory one of the other; and if, thus reading them, the conviction justifies the commitment so explained, it is sufficient. Taking the two together in this case, the conviction explains the ambiguous words at the end of the commitment; and they may, on the principle of the decision in *Goff's* case, above referred to, be construed, by aid of the conviction, to mean that the plaintiff is to be imprisoned for a month, unless the money be in the meantime paid. It is unnecessary for us to decide whether the imprisonment would have been justified, if the conclusion of the warrant had not contained ambiguous words, capable of explanation by the context, and had been plainly wrong; as, if the commitment had been for two months, and the adjudication for one, unless the money should have been first paid; though, looking at the very large words of the 39th section, even such a defect may have been intended to be cured. We, therefore, think that the 39th section does cure the defect in this case, as the warrant does refer to a conviction, and there is a good and valid conviction on which the warrant was founded, and which does, when both are read together, *sustain* the warrant, even in the sense attributed to that word by the plaintiff's counsel; that is, it authorizes the imprisonment mentioned in the warrant. We feel satisfied, that by giving this construction to this clause, we are acting in accordance with the intention of the legis-

lature, which clearly was to protect magistrates from the consequences of inaccurate commitments, drawn up on the spur of the occasion by unlearned men. The rule must therefore be discharged.

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TRESPASS for assaulting the plaintiff and taking him to a police station-house. Pleas: first, not guilty; secondly, that the defendant was possessed of a dwelling-house in the city of London, and that the plaintiff entered and came into the said house and made a great disturbance and affray therein, and insulted, abused, and ill-treated the defendant and his servants in the said dwelling-house, and disquieted them in their possession thereof, against the king's peace; whereupon the defendant requested the plaintiff to cease his disturbance and depart from the said house, which the defendant refused to do, and then and there insulted, abused, and ill-treated *the defendant and his servants* in the dwelling-house, and greatly disturbed them in the peaceable possession thereof, in breach of the peace; whereupon the defendant requested the plaintiff to cease his disturbance, and to depart from and out of the house, which the plaintiff refused to do, and continued in the house, making the said disturbance and affray therein; that thereupon the defendant, in order to preserve the peace and restore good order in the house, gave charge of the plaintiff to a certain policeman, and requested the policeman to take the plaintiff into his custody, to be dealt with according to law; and that the policeman, at such request of the defendant, gently laid his hands on the plaintiff, for the cause aforesaid, and took him into custody.

It appeared in evidence that the plaintiff entered the defendant's shop to purchase an article in the shop, when a dispute arose between the plaintiff and the defendant's shopman; that the plaintiff refusing on request to go out of the shop, the shopman endeavoured to turn him out, and an affray ensued between them; that the defendant came into the shop during the affray, which continued for a short time after he came in; that the defendant then requested the plaintiff to leave the shop quietly, but he refusing to do so, the defendant gave him in charge to a policeman, who took him to a station house.

Held, first, that the defendant was justified, under the circumstances, in giving the plaintiff in charge to a policeman, for the purpose of preventing a renewal of the affray.

Held, secondly, that the plea was not substantially proved, inasmuch as the alleged assault on the defendant himself was not proved.

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to do, and continued in the said house, making the said disturbance and affray therein; whereupon the defendant, in order to preserve the peace and restore good order and tranquillity in the said house, then and there gave charge of the plaintiff to a policeman to take the plaintiff into custody, to be dealt with according to law. The plea then alleged that the policeman took the plaintiff into custody, and conducted him out of the said house to the police station for examination, and to be dealt with according to law.

To this there was the general replication, *de injuriâ*.

At the trial before *Parke*, B., at the London sittings after last Trinity term, the plaintiff obtained a verdict on the general issue, with 15*l.* damages; but the jury found a verdict for the defendant on the issue upon the special plea, the learned judge giving the plaintiff leave to move to enter a verdict for him, if the Court should be of opinion that the facts proved in evidence did not support that plea. *Thesiger* having, in Michaelmas term last, obtained a rule accordingly, or for judgment non obstante veredicto—

*Bompas*, Serjt., shewed cause; and *Thesiger* was heard in support of the rule, in the same term; and the Court took time to consider. But the facts of the case and the arguments are so fully stated in the judgment of the Court, that it has been thought unnecessary to state them here.

*Cur. adv. vult.*

PARKE, B. now delivered the judgment of the Court.—This was an action of trespass and false imprisonment, tried before me at the sittings after Trinity term last, at *Guildhall*. The declaration was for an assault and false imprisonment; to which there was a plea of

not guilty, and a special plea of justification, on the ground that the plaintiff was guilty of a breach of the peace in the defendant's dwelling-house, and that he thereupon gave him in charge to a policeman, who was not averred to have had view of the breach of the peace. To this special plea there was a replication of *de injuriâ suâ propriâ absque tali causâ*. On the trial the jury found a verdict for the plaintiff on the general issue, and for the defendant on the special plea, as I was of opinion that the material parts of it were proved; but, as it appeared to me that the plea was bad in law, I directed the jury to assess the damages on the general issue, and I also gave the plaintiff permission to move to enter a verdict for him on the special plea, if the Court should be of opinion that it was not substantially proved. A rule nisi having been obtained to enter a verdict for the plaintiff, or judgment non obstante veredicto, the case was fully argued before my brothers *Bolland, Alderson, Gurney*, and myself, last term. We have since considered the case, and are of opinion that the rule ought not to be made absolute, but that there should be a new trial, unless the parties will consent to enter a *stet processus*.

The facts of the case, as to which there was little or rather no contradictory evidence, may be very shortly stated. The defendant was a linen-draper; the plaintiff was passing his shop, and seeing an article in the window with a ticket apparently attached to it, denoting a low price, sent his companion in to buy it; the shopman refused, and demanded a larger price; the plaintiff went in himself and required the article at the lower rate. The shopman still insisted on a greater price; the plaintiff called it "an imposition." Some of the shopmen desired him to go out of the shop in a somewhat offensive manner; he refused to go without the article at the

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price he bid for it; the shopmen pushed him out. Before they did so, he declared he would strike any one who laid hands on him. One of the shopmen, really supposing, or pretending to suppose this to be a challenge to fight, stepped out and struck the plaintiff in the face, near the shop door; the plaintiff went back into the shop and returned the blow, and a contest commenced, in which the other shopmen took a part, and fell on the plaintiff. There was a great noise in the shop, so that the business could not go on—many persons were there, and others about the street door. The noise brought down the defendant, who was sitting in the room above. When he came down he found the shop in disorder, and the plaintiff on the ground struggling and scuffling with the shopmen, and this scuffle continued in the defendant's presence for two or three minutes. The defendant sent for a policeman, who soon afterwards came; in the meantime the plaintiff was taken hold of by two of the shopmen, who, however, relinquished their hold before the policeman came, and on his arrival the plaintiff was requested by the defendant to go from the shop quietly, but he refused, unless he first obtained his hat, which he had lost in the scuffle. He was standing still in the shop, insisting on his right to remain there, and a mob gathering round the door, when the defendant gave him in charge to the policeman, who took him to the police station. The defendant followed, but on the recommendation of the constable of the station, the charge was dropped.

Upon these facts the plaintiff appears to have been, in the first instance, a trespasser, by refusing to quit the shop when requested, and so to have been the cause of the affray which subsequently took place; but the first act of unlawful violence and breach of the peace was committed by the shopman; that led to a conflict, in

which there were mutual acts of violence clearly amounting to an affray, the latter part of which took place in the defendant's presence; and the plaintiff was on the spot on which the breach of the peace occurred, persisting in remaining there under such circumstances as to make it probable that the breach of the peace would be renewed, when he was delivered by the defendant to the police officer in the very place where the affray had happened.

The first question which arises upon these facts is, whether the defendant had a right to arrest and deliver the plaintiff to a constable, the police-officer having, by the stat 10 Geo. 4, c. 44, s. 4, the same powers as a constable has at common law. It is not necessary for us to decide in the present case, whether a private individual, who has seen an affray committed, may give in charge to a constable who has not, and such constable may thereupon take into his custody the affrayers, or either of them, in order to be carried before a justice, after the affray has entirely ceased, after the offenders have quitted the place where it was committed, and there is no danger of its renewal. The power of a constable to take into his custody upon the reasonable information of a private person under such circumstances, and of that person to give in charge, must be correlative. Now, as to the authority of a constable, it is perfectly clear that he is not entitled to arrest, in order himself to take sureties of the peace, for he cannot administer an oath; *Sharrock v. Hannemer* (a); but whether he has that power, in order to take before a magistrate, that he may take sureties of the peace, is a question on which the authorities differ. Lord Hale seems to have been of opinion that a constable has this power; 2 *Hale's Pleas of the Crown*, 89. And the same rule has been laid down at Nisi Prius by

(a) Cro. Eliz. 376; Owen, 105, S.C. nomine *Scarrel v. Tanner*.

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Lord *Mansfield*, in a case referred to in 2 *East's Pleas of the Crown*, 306; and by *Buller*, J., in two others, one quoted in the same place, and another cited in 3 *Campb. N. P. C.* 421. On the other hand, there is a dictum to the contrary in *Brook's Abt. Faux Impt.* 6, which is referred to and adopted by Lord *Coke* in 2 *Inst.* 52; Lord *Holt*, in *The Queen v. Tooley (a)*, expresses the same opinion. Lord Chief Justice *Eyre*, in the case of *Coupey v. Henley (b)*, does the same. And many of the modern text books state that to be the law; *Burn's Justice*, 26th edit. Arrest, 258; *Bacon's Abt. D. Trespass*, 58; 2 *East's Pleas of the Crown*, 506; *Hawkins's Pleas of the Crown*, book 2, c. 13, s. 8. Upon the present occasion, however, we need not examine and decide between these conflicting authorities; for here the defendant, who had immediately before witnessed an affray, gave one of the affrayers in charge to the constable on the very spot where it was committed, and whilst there was a reasonable apprehension of its continuance; and we are of opinion that he was justified in so doing, though the constable had seen no part of the affray. It is unquestionable that any bystander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it till the affray be ended. It is also clearly laid down that he may arrest the affrayers, and detain them until the heat be over, and then deliver them to a constable. *Lambard*, in his *Eirenarcha*, c. 3, p. 130, says, "Any man also may stay the affrayers until the storm of their heat be calmed, and then may he deliver them over to a constable to imprison them till they find surety for the peace; but he himself may not commit them to prison, unless the one of them be in peril of death by some hurt, for then may any man carry the other to the gaol till it be known whether he, so hurt,

(a) 2 Lord Raym. 1301.

(b) 1 Esp. 540.

will live or die, as appeareth by the stat. 3 *Hen.* 7, c. 1." In *Hawk. P. C.* book 1, c. 63, s. 11, it is said, that it seems agreed that any one who sees others fighting may lawfully part them, and also stay them until the heat be over, and then deliver them to the constable, who may carry them before a justice of the peace, in order to their finding sureties for the peace; and pleas founded upon this rule, and signed by Mr. Justice *Buller*, are to be found in 9 *Went. Plead.* 344, 345; and *De Grey*, C. J., on the trial, held the justification to be good. It is clear, therefore, that any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled, and his desire to break the peace has ceased, and then deliver him to a peace officer. And if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but whilst he shews a disposition to renew it, by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is, that for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shews that the public peace is likely to be endangered by his acts. In truth, whilst those are assembled together who have committed acts of violence, and the danger of their renewal continues, the affray itself may be said to continue; and *during the affray* the constable may not merely on his own view, but *on the information and complaint of another*, arrest the offender; and of course the person so complaining is justified in giving the charge to the constable; Lord *Hale*, *P. C.*(a). The defendant therefore had a right in this case, the danger continuing, to deliver the plaintiff into the hands of the

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(a) Vol. ii. p. 89.

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police officer, unless the circumstance that the plaintiff was not guilty of the first illegal violence make a difference. Now at the time the defendant interfered, he was ignorant of that fact; he saw the plaintiff and others in a mutual contest, and that mutual contest the law gave him power to terminate, for the sake of securing the peace of his house and neighbourhood, and the persons of all those concerned, from violence; and if he had the power to arrest all, he was justified in securing any one, not absolutely, but only until a magistrate could inquire into all the circumstances on oath, and bind over one party to prosecute, or the other to keep the peace, as upon a review of all the circumstances he might think fit. If no one could be restrained of his liberty, in cases of mutual conflict, except the party who did the first wrong, and the bystanders acted at their peril in this respect, there would be very little chance of the public peace being preserved by the interference of private individuals, nor indeed of peace officers, whose power of interposition on their own view appears not to differ from that of any of the king's other subjects. For these reasons we are of opinion that the defendant was, upon the facts in evidence, justified in delivering the plaintiff to the police officer.

This brings me to the second question, whether the plea upon the record was substantially proved. I thought upon the trial that it was, but, upon further consideration, I concur with the rest of the Court in thinking that it was not. The plea was as follows:—"And the defendant says, that before and at the said time when &c. the said defendant was lawfully possessed of a certain dwelling-house in the city of London, and the said defendant being so possessed thereof, the said plaintiff just before the said time when &c. entered and came

the said dwelling-house, and then and there, with arms, made a great noise, disturbance, and therein, and then and there insulted, abused, and beat the defendant and his servants in the said house, and greatly disturbed and disquieted the peaceable and quiet possession of the said house, in breach of the peace of our said lord; whereupon the defendant then and there required the plaintiff to cease his noise and disturbance, to depart from and out of the said house, which the plaintiff then and there wholly refused to do, and continued in the said house, making the said noise, disturbance and affray therein; whereupon the defendant, in order to preserve the peace and restore good order and quietness in the said house, then and there gave charge to the plaintiff to a certain policeman of the city of London, and then and there requested the said policeman to take the plaintiff into his custody, to be dealt with accordingly; and the said policeman, so being such policeman as was lawfully appointed, at such request of the defendant, then and there lawfully laid his hands on the plaintiff for the cause aforesaid, and did then and there take the plaintiff into custody." The replication puts in issue all the allegations constituting the ground of the arrest, and of these it is necessary to prove *all*. It is enough to establish any one of them as would justify the arrest. It is not necessary to prove facts which justify the imprisonment, but necessary to prove such of the facts *alleged* as would justify the arrest. The allegations which were proved were that the plaintiff entered the defendant's house, the assault on his person, the disturbance of the defendant in his possession of the house, by an affray in it, in which the plaintiff was a part, just before the time of the arrest, and that the defendant gave the plaintiff in charge in order

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to preserve the public peace; but the fact of an assault on the plaintiff himself was not proved, and that is the only breach of the peace which in the plea appears by necessary implication to have been committed in the defendant's presence; for in none of the other alleged facts is the defendant's presence inserted or necessarily implied before the moment of actual interference. The disturbance of the defendant in the possession of his dwelling-house, might have occurred by an entry in his absence, and therefore that averment does not by necessary implication affect the defendant's presence. If so, the substance of this plea, that is, so many of the allegations in it as constituted a defence, was not proved, as the assault on the defendant himself was not proved. For this reason we think that the proof failed; but as this is a case in which an amendment would have been allowed by virtue of the late statute, as it is clear upon the facts that there was a defence, on the ground of the defendant's right to arrest for a breach of the peace in his presence, and as the declaration of my opinion, that the plea was substantially proved, at the time, probably prevented an application to amend, we think that there should be a new trial, when, or before which, the plea may be amended. And as ultimately there will be a verdict for the defendant, if the same evidence is adduced, the best course will be for the parties to agree to enter a *stet processus*.

Rule accordingly.



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## MELLOR v. BADDELEY and another.

ASE. The first count of the declaration stated that plaintiff was a good, true, and faithful subject, &c. and had never been guilty of poaching or unlawfully been guilty of any trespass in search of game, &c., yet that defendants, contriving &c., on &c. appeared before one *John Sneyd*, one of the justices &c., and maliciously, and without any reasonable or probable cause, used a certain false and malicious information to be exhibited against the plaintiff, for that he the plaintiff, on &c. unlawfully commit a trespass, by entering and being in the day-time upon a certain common or piece of land, in the possession and occupation of *Daniel Ward Baddeley* there, in search of game, and upon such information maliciously, and without any reasonable or probable cause, caused the said *J. S.* to grant his summons for the summoning of the plaintiff before him the said *J. S.*, on &c. then next, to answer the said information; that the defendants caused the plaintiff to be served with the said summons; that the defendants, &c., maliciously, and without any reasonable or probable cause, caused the said *J. S.* wrongfully and illegally to convict the plaintiff of the supposed offence in the information specified, and to adjudge that he should forfeit 2*l.*, together with 1*l.* 10*s.* for costs, and in default of payment to be imprisoned two calendar months; and that the defendants maliciously, and without probable cause, caused the said *J. S.* to grant his certain warrant of commitment, whereby the constable of the parish of Stoke-upon-Trent was commanded to convey the plaintiff to gaol, and the keeper of the common gaol was commanded to receive and keep the plaintiff in the said gaol for two calendar months, unless the penalty and

Where in an action on the case against a party for maliciously, and without probable cause, causing an information to be laid against the plaintiff for trespassing on land in pursuit of game, in the day time, under stat. 1 & 2 Will. 4, c. 32, and thereby causing him to be convicted and imprisoned by a justice of the peace, the plaintiff did not appeal against the conviction, pursuant to the 44th section of that statute, but suffered the imprisonment under the conviction, and the conviction was still subsisting. Held, that the action was not maintainable; and the plaintiff having been nonsuited, the Court refused to set it aside.

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costs should be sooner paid; and that the defendants maliciously caused the plaintiff, under and by virtue of the said commitment, to be arrested, and to be conveyed to gaol, and wrongfully and maliciously caused him to be imprisoned without probable cause for two calendar months, at the expiration of which said time the said plaintiff was duly discharged and fully released from the said gaol. There were three other counts in the declaration in substance the same, but varying in form.

At the trial before *Park, J.* at the last assizes for the county of Stafford, it appeared from the statement of the plaintiff's counsel, that an information was laid by the defendants against the plaintiff before Mr. *Sneyd* for a trespass on the 25th of February, in the day-time, in pursuit of game, under the 1 & 2 Will. 4, c. 32, s. 30; and the offence having been proved by one of the defendants, that Mr. *Sneyd* had ordered the plaintiff to pay 2*l.* and 1*l.* 10*s.* costs, or to be committed for two calendar months; and the plaintiff being too poor to pay the money, and being unable to find sureties to enable him to appeal, was imprisoned for that period. Upon this statement it was contended by the defendants' counsel, that the existing conviction, which they were prepared to prove, was conclusive evidence of probable cause; and that, to support the action, it was incumbent on the plaintiff to prove that the proceedings upon the information had terminated in favour of the plaintiff; they relied upon *Matthews v. Dickenson* (a), and *Whitworth v. Hall* (b). The learned Judge was of opinion, that, as by the 44th section of the 1 & 2 Will. 4, c. 32, the party had the power of appealing, the action could not be maintained without shewing that the conviction had been quashed, and accordingly directed a nonsuit.

(a) J. B. Moore, 104; 7 Taunt. 399.

(b) 2 B. & Ad. 695.


*Graves* on a former day in this term moved to set that nonsuit aside, and for a new trial. The cases cited at the trial of *Matthews v. Dickenson* and *Whitworth v. Hall* do not apply to this case, as the proceeding here complained of as malicious was not of a civil but a criminal nature. The proceeding being of a criminal nature there could be no mutuality, as the quashing of the conviction would not have been evidence in the plaintiff's favour in an action of trespass brought against him by *Baddeley*, the owner of the land (a). The conviction, having been obtained on the evidence of one of the defendants, was not admissible in evidence in a civil proceeding between them and the plaintiff; *Smith v. Rummen* (b); where it was held, that "if A. is convicted before a magistrate on the evidence of B., although B.'s name does not appear on the conviction, he cannot avail himself of it in any civil proceeding between him and A.;" and *Hathaway v. Barrow* (c) is to the like effect. The effect of receiving such evidence would be to make a party a witness in his own cause.

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The Court took time to confer with the learned Judge who tried the cause, and the opinion of the Court was now delivered by

VAUGHAN, B.—This was an action against the defendants for maliciously and without probable cause laying an information before a magistrate against the plaintiff, and causing him to be imprisoned thereon. The declaration having set out the summons, and a conviction under the Game Act, 1 & 2 Will. 4, c. 32, s. 30, alleged, that a penalty and costs were imposed by the conviction, for the non-payment of which the plaintiff was committed to prison, and kept in custody there for

(a) 1 Stark. on Evid. 234—237. (b) 1 Camp. 9. (c) *Id.* 151.

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two months. The action was not brought against defendant for any act done by him in his character as a magistrate, but for maliciously laying an information without reasonable or probable cause. The plaintiff counsel in the course of his case, after having examined some witnesses, was interrupted by the statement of the counsel for the defendants, that they could produce a conviction under 1 & 2 Will. 4, c. 32, for passing in pursuit of game, which not having appeared against, pursuant to section 44 of the act, afforded conclusive answer to the charge of malice and was probable cause for the information. The plaintiff nonsuited, on the ground that he ought to have pleaded within the time limited by section 44 of the statute. We are of opinion, that, to support this action it was necessary that there should have been proof of a prosecution which had been discharged and put an end to, and also of want of probable cause, and a damage sustained in consequence of the prosecution. The declaration contains counts, some for causing the plaintiff to be committed, and others for causing him to be arrested; but all substantially state the same cause of action; and the simple question is, whether this declaration unreversed must of necessity be an answer to the action, as shewing probable cause for laying the information complained of. It is unnecessary to refer to many cases, but there is one of *Whitworth v. Hall* which is direct to the point. That was an action against a party for maliciously suing out a commission of bankruptcy, which was not proceeded in, and therefore brought to an end. There Lord Tenterden said, 'this action cannot be supported for maliciously holding bail, without shewing that the proceedings were a failure, and yet the discharge from arrest is in the discharge

of the Court;" and *Littledale*, J. added, "there is distinction between the action for a malicious prosecution by indictment or for a malicious arrest, and one maliciously suing out a commission of bankrupt.

Of them it is necessary to shew that the original proceeding which formed the alleged ground of the action has an end." In this case the conviction under 1 & 2 4, c. 32, being summary, section 44 gives to the convicted an appeal from it to the quarter sessions, and he gave the complainant a notice in writing within three days after such conviction, and shall also remain in custody till the sessions, or within such days enter into a recognizance to appear and try the appeal. The plaintiff in this case neither gave notice of appeal nor entered into such recognizance, but demanded the punishment awarded on the conviction. Therefore, as he acquiesced in it, that was evidence of an able cause.

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Rule refused.

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SUMPSIT, by the plaintiff, as clerk to the Under-sheriff of the Aire and Calder Navigation, against the defendant, an overseer of the township of Brotherton, for a premises, against which an appeal was entered at the October sessions, and was adjourned to the following sessions in January. On the 15th of December, 1828, the defendant was distrained for the increased rate; but, to prevent a sale, the amount was tendered under protest, and the distress relinquished. The rate was subsequently reduced, in consequence of the decision of the Court of King's Bench, on a case sent to the justices on the hearing of the appeal. It did not appear that any notice of the appeal had been given to the overseers, pursuant to the 41 Geo. 3, c. 23, s. 2, before the levy. In an action brought by the party on whom the increased rate was made against the defendant, one of the overseers at the time of the levy, to recover back the excess above the last effective rate, as money had and received to his use. Held, that as no notice of appeal had been given to the overseers pursuant to the second section of the statute, the action could not be maintained.

On the 15th of August, 1828, an increased poor-rate was assessed on

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money had and received by the defendant to the use of the Undertakers, and on an account stated. Plea: the general issue. At the trial before *Alderson, J.*, at the spring assizes for the county of York, 1833, the jury found a verdict for the plaintiff for 163*l.* 3*s.* 3*d.*, subject to the opinion of this Court on the following case:

On the 15th August, 1828, the overseers of the poor of the township of Brotherton, in the county of York, of whom the defendant was one, duly made and published a rate for the relief of the poor of the said township, in which they rated the said Undertakers at the sum of 150*l.* in respect of property of the annual value of 9000*l.* Against this rate the said Undertakers entered an appeal at the October sessions, 1828, which appeal was respited till the following sessions in January, 1829. On the 15th December, 1828, after summons and refusal to pay, a distress was duly made by the said defendant, who was one of the overseers of Brotherton, on a vessel belonging to the said Undertakers, for 150*l.*, being the amount of the said rate; and, to prevent a sale, the sum of 163*l.* 3*s.* 3*d.*, being the amount of the said rate and of the expenses of the said distress, were paid to the defendant, being still overseer of the poor, who was at the same time served with the following written protest, signed by the Company's clerk, and expressed to be on behalf of the Undertakers of the Aire and Calder Navigation.

"I do hereby tender you the sum of 150*l.*, for which you have distrained the goods and chattels of the said Undertakers, and also the sum of 13*l.* 3*s.* 3*d.* for costs of distress, making together the sum of 163*l.* 3*s.* 3*d.*; but I do on their behalf hereby protest against your right to recover the same by the illegal distress you have made; and I do hereby give you notice that an action will be brought for restitution and for damages. Dated 15th December, 1828."

And the defendant on that occasion gave a receipt for the said sum of 163*l.* 3*s.* 3½*d.*, of which the following is a copy :

" Received, the 15th December, 1828, of the Aire and Calder Navigation (by payment of *J. P. S.*), the sum of *M.* claimed and distrained for by the township of Brotherton for poor-rates, upon the Undertakers of the said navigation, together with 13*l.* 3*s.* 3½*d.* for costs attending distraining the same.

50 0 0	(Signed) <i>E. W.</i> , one of the overseers
13 3 3½	of the poor of the said
<u>63 3 3½</u>	township of Brotherton."

At the January sessions, 1829, the rate was confirmed by an order of sessions, subject to a case for the opinion of the Court of King's Bench; and, whilst the decision on this case was pending, viz. on 27th March, 1829, another rate was made by the overseers of the said township of Brotherton, in which a similar charge was made upon the said Undertakers in respect of the same property, assessed at the same annual value of 2000*l.*; against which rate the said Undertakers appealed to the next sessions, which appeal was respited; but before the following sessions, viz. in Trinity term, 1829, the Court of King's Bench ordered that the order of sessions confirming the rate of the 15th August, 1828, should be reversed, and the said rate amended by an order, of which the following is a copy :

" King's Bench.—Wednesday next after three weeks of the Holy Trinity, in the tenth year of King George the Fourth.

" Liberty of St. Peter's, York.—*The King v. The Undertakers of the Aire and Calder Navigation.*—Upon hearing the counsel on both sides, it is ordered that an order of sessions made on the appeal of the defendants

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against a rate or assessment made for the relief of the poor of the township of Brotherton, in the West Riding of the county of York, and within the liberty of St. Peter's, York, be quashed for the insufficiency thereof, and that the Sessions do amend the said rate by striking out therefrom the assessment made upon the defendants in respect of that part of the river Aire which lies within the said township of Brotherton. And it is further ordered, that the defendants have leave to give a new notice of appeal against the said rate or assessment, and to specify therein, if they think fit, any new ground of appeal against the said rate or assessment."

At the July sessions, 1829, the appeal against the rate of the 27th of March, 1829, was heard, and that rate was amended by increasing the assessment on the annual value of the ratable property of the said Undertakers in the said township from 2000*l.* to 2010*l.* 2*s.* 8*d.*, and an order of sessions was made accordingly, subject to a second case for the opinion of the Court of King's Bench. The overseers of the poor of the said township, however, continued, until the determination of the Court of King's Bench on such second case, to make rates for the relief of the poor, in all of which the said Undertakers were rated upon property assessed at the annual value of 2010*l.* 2*s.* 8*d.*; and the said Undertakers continued to appeal against each of such rates to the quarter sessions. At the January sessions, 1830, the appeal against the rate of August, 1828, was respited to the next sessions, no notice having been given to the sessions of the order of the King's Bench of Trinity term, 1829, hereinbefore mentioned. No further notice of that appeal appears in the records of the sessions, nor any other respite thereof, during 1830, 1831, nor until the Easter sessions, 1832. At the Easter sessions, 1832, the rate of the 15th August, 1828, and all the subsequent rates, were amended by reducing the annual value of the ratable property of the

said Undertakers in the said township to 15*l.* 16*s.* Upon such reductions the amount of all the before-mentioned rates, payable by the said Undertakers to the overseers of Brotherton, was 12*l.* 0*s.* 6*d.* only. The said Undertakers made no application at the July sessions, 1832, for any order directing the overseers of the township of Brotherton to refund to the said Undertakers the sum of money so paid to the said defendant as aforesaid, deducting the said sum of 12*l.* 0*s.* 6*d.*, nor was any entry made, nor any proceeding had respecting the said rate; but on the 12th October, 1832, the following notice was served on the defendant:

“To the Churchwardens and Overseers of the Poor of the township of Brotherton, in the liberty of St. Peter of York, in the West Riding of the county of York, and every of them, and especially to *Edward Watson and Walker Smith* and to each of them.

“As the solicitor and law agent, and on behalf of the Undertakers of the navigation of the rivers Aire and Calder, in the West Riding of the county of York, I hereby demand of you to repay and return to the said Undertakers the sum of money which was paid to you by the said Undertakers, or their agent, on or about the 15th day of December, 1828, as the amount of a certain rate or assessment bearing date the 15th day of August, 1828, for and towards the necessary relief of the poor of the said township of Brotherton, rated and assessed upon the said Undertakers as owners and occupiers of a cut or canal, and that part of the river Aire within the township of Brotherton, dams, locks, and weirs, and tolls, dues, or rates, and the costs, charges, and expenses of putting into execution a warrant of distress for the same rates, bearing date on or about the 22d day of November, 1828,

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under the hands and seals of *Henry John Dickins, Esq.*, and *Danson Richardson Currer*, clerk, two of his Majesty's justices of the peace in and for the said liberty, after deducting thereout such sum and sums of money as are due from the said Undertakers for the rates or assessments rated and assessed upon them in respect of their property in the said township of Brotherton, and which have been amended and reduced by the general quarter sessions in and for the said liberty, in pursuance of the order and direction of his Majesty's Court of King's Bench in that behalf; and also take notice, that in case you shall refuse or neglect to pay the same to me, or to *Mr. Joseph Priestley*, at the office of the said Undertakers in Wakefield, within six days from the service hereof, an application will be made to the next general quarter sessions of the peace to be holden for and in the said liberty on the 20th day of October instant, as soon as counsel can be heard, for an order of the said Court to be made upon you, the churchwardens and overseers of the poor of the said township of Brotherton, to repay and return to the said Undertakers all such sum and sums of money as they ought not to have been paid or been charged with; and also to pay to the said Undertakers, or their said agent, all costs, charges, and expenses occasioned by their having paid, and having been required to pay the said sum of money so wrongfully charged upon them as aforesaid, in respect of the said rate or assessment above mentioned. Dated 11th October, 1832.

*Samuel Hailstone."*

The said Undertakers accordingly made an application at the following October sessions, 1832 (a), for an order directing the overseers of the said township of Brotherton


(a) See *Rex v. Justices of St. Peter's Liberty, York*, 4 B. & Adol. 342; 1 Nev. & Mann. 108, S. C.

to refund to the said Undertakers the said sum of money so paid to the said defendant as aforesaid, deducting therefrom such sum as was due according to the said amended rates; which application was refused by the justices at the said sessions. In the years 1826 and 1827, and from thence to the time of the distress, between two and three pounds, but never more than five pounds a year, had been collected for poor-rates from the said Undertakers by the overseers of Brotherton, but no rate-books were produced at the trial previous to August, 1828. The defendant *Watson* was one of the overseers of the poor of Brotherton for the years 1828, 1829, 1830, 1831, and 1832 respectively, but with different coadjutors in each of these years. The township of Brotherton, long before and since August, 1828, adopted the provisions and complied with the requisites of 22 Geo. 3, c. 85, commonly called *Gilbert's Act*, and the said sum of 150*l.*, on the same day that it was received, was paid over by the defendant to *W. Smith*, the guardian of the poor of the township of Brotherton, appointed under that act before the rate was made, and who had continued to be so up to the time of his receipt of the money, and was so at the time of the action brought. The money so paid was appropriated by the guardian to the fund for the general relief of the poor of the township, and had been expended before the 12th of October, 1832. The question for the opinion of the Court was, whether, under the above circumstances, the plaintiff was entitled to recover the said sum of 163*l.* 3*s.* 3½*d.*, or any and what part thereof.

The points stated for argument on the part of the plaintiff were, that the Undertakers of the navigation were entitled to recover the whole amount for which the verdict was entered, as a payment made under compul-

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sory process, which was subsequently determined to be illegal, deducting only the sum of 12*l.* 0*s.* 6*d.*, the amount of all the amended and reduced rates.

On the part of the defendant,—first, that the money was paid to the defendant as overseer of the township of Brotherton, and by him immediately paid over to the guardian of the poor of that township, pursuant to the stat. 22 *Geo.* 3, c. 83, ss. 7, 8; secondly, that it did not appear that the distress was illegal, and that the defendant was within the stat. 41 *Geo.* 3, c. 23, ss. 1, 2, 3, 4, and 8; thirdly, that the plaintiff had neither proved a demand of the perusal and copy of the warrant of distress, nor that the action was commenced within six months after the act committed, pursuant to the 24 *Geo.* 2, c. 44, ss. 6 and 8.


*Wightman*, for the plaintiff. The Court of Quarter Sessions having refused to interfere, the Undertakers of the Aire and Calder Navigation will have no means of recovering this money, which was clearly paid under an illegal process, unless this action can be maintained. [*Alderson*, B. It all arises from their own neglect in not restraining the overseer from levying more than the amount of the assessment in the last effective rate, according to the 41 *Geo.* 3, c. 23, s. 2.] That clause is inapplicable. The authority given by that section to overseers to levy the sum assessed, notwithstanding an appeal, merely enables them to take such sum in the first instance; but, if the rate is afterwards reduced, they are liable to refund the overplus. The distress may have been legal to the amount of the last effective rate, but it may subsequently have become unlawful to retain the money, and then the right of action would accrue. [*Parke*, B. The money was lawfully taken. At what time did it become money had and received to

the plaintiff's use?] As soon as the Court of King's Bench had determined that the rate was invalid. [Lord *Lyndhurst*, C. B. If the money was lawfully taken by the defendant, it was lawfully paid over to the guardian of the poor, and there was a legal application of the money in his hands to parochial purposes, before the application to the sessions in 1852, to have the excess repaid. The Undertakers might have protected themselves by pursuing the remedy pointed out by the statute.] The paying the money over cannot make any difference, because if the sessions had made an order that the money should be repaid, the order must have been directed to the churchwardens and overseers, and not to the guardian of the poor. Before the passing of the 22 Geo. 3, c. 83, this action to recover back the amount might clearly have been maintained. In *Feltham v. Terry*, cited by *Ashhurst, J.*, in *Birch v. Wright (a)*, it was held that an action for money had and received would lie against an overseer of the poor to recover money which had been levied upon a conviction which was afterwards quashed; and in *Watkins v. Hewlett (b)*, where the putative father of a bastard child paid, before its birth, a fixed sum to the parish officers to discharge him from all future responsibility for the maintenance of the child, it was held that after the birth and death of the child, he might recover back such part of the money as remained unexpended, as money had and received to his use. That was on the ground of there being a failure of consideration, which is the case here. [*Parke, B.* It does not appear in this case that any notice of appeal was given to the defendant at the time of the levy. In order to make him a wrong-doer, it is essential that he should have had notice of appeal, because, if he had not,

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(a) 1 T. R. 387; 1 Cowp. 419.

(b) 3 J. B. Moore, 211; 1 Brod. & B. 1.

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the 41 *Geo. 3*, c. 23, s. 2, entitled him to levy the whole amount of the rate, and he was bound to pay it over to the guardian of the poor, to be applied to parochial purposes.] A notice of appeal may be inferred to have been given.

Lord LYNTHURST, C. B.—We are not to conjecture that a notice of appeal was given. It is essential that such notice should have been given, and, if it had been, it ought to have been proved.

ALDERSON, B.—Under this act the defendant was bound to pay over the money to the guardian, and the action is not brought until it is paid over. It does not appear that any notice of appeal was given at the time of the levy. The defendant is not shewn to be a wrongdoer, and the action, therefore, cannot be maintained.

Judgment for the defendant.

*Bliss* was to have argued for the defendant.



STEVENS v. The Mayor of BERWICK-UPON-TWEED (*a*).

. The circumstance of an attorney being a burgess does not entitle him, in an action against the corporation for costs, to inspect the corporate books in order to prove his retainer.

*W. H. WATSON* moved for a rule to shew cause why the plaintiff in the present case should not be at liberty to inspect the guild books of the corporation of Berwick-upon-Tweed. The plaintiff was an attorney and a burgess, and the present action was brought against the corporation for business done as an attorney. He was desirous of obtaining the inspection now prayed

(*a*) This and the following case are taken, by permission, from *Dowling's Practice Cases*.

for, in order to prove his retainer. Being a corporator, he had an interest in the books of the corporation, and was entitled to an inspection of them.

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LITLEDALE, J.—The plaintiff's claim here has nothing to do with the affairs of the corporation. If you require the books at the trial, you must give notice to produce them; and if they are not produced, you may give secondary evidence of their contents. Such applications as the present are granted only in those cases where the opposite party stands in the situation of a trustee for both parties. That is not the case here. It is true that the plaintiff has a right to inspect the books, where his rights as a burgess are affected; but here his rights as a burgess do not come in question; and the mere accidental circumstance of his being a burgess cannot give him a right to inspect the corporation books for the purpose of sustaining his private claims. If such applications were allowed, the time of public officers would be perpetually occupied in consequence of them.

Rule refused.

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A RULE nisi had been obtained for a mandamus to be directed to the defendant, commanding him to deliver over certain parish books and monies to the present overseer of the parish of Brancaster. The affidavits in support of the rule stated, that the defendant, who was appointed overseer in the year 1833-4, had, in December, 1833, been convicted of wilful misapplication of the parish monies, under 4 & 5 Will. 4, c. 76, (the Poor Law

Where an overseer is rendered incompetent to serve, in consequence of a conviction under the 4 & 5 Will. 4, c. 76, s. 97, and an application is made for a mandamus to compel him to deliver up books &c. belonging to the parish, the conviction must be annexed to the affidavits in support of the rule.

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Amendment Act) s. 97(a) and that another person has been appointed in his place for the rest of the year; but that he refused to deliver over the books and monies of the parish. It appeared by the affidavits in answer, that no conviction had been drawn up, and, therefore, *Littledale, J.* called upon

*Austin*, in support of the rule, who contended, that the legal consequences of the conviction attached immediately upon the decision of the justices. The drawing up the conviction was merely form, and might be done at any time, even after the penalty had been levied; *Rex v. Barker(b)*. The defendant, therefore, had ceased to be overseer, by the operation of the act of parliament, from the moment when the conviction took place. It would, at all events, be sufficient, if the conviction were drawn up before the writ of mandamus issued, supposing it to be necessary to recite the conviction in the writ.

LITLEDALE, J. intimated that he was of a different opinion, but that he would consult the rest of the Court.

*Cur. adv. vult.*

(a) "And be it further enacted, that, if any overseer, assistant overseer, master of a workhouse, or other paid officer, or any other person employed by or under the authority of the said guardians, shall purloin, embezzle, or wilfully waste or misapply any of the monies, goods, or chattels belonging to any parish or union, every such offender shall, besides and in addition to such pains and penalties as such person so offending shall, independently of this act, be liable

to, upon conviction before two justices, forfeit and pay, for every such offence, any sum not exceeding 20*l.*, and also treble the amount or value of such money, goods, or chattels so purloined, embezzled, wasted, or misapplied, and every person so convicted shall be for ever thereafter incapable of serving any office under the provisions of this or any other act in relation to the relief of the poor."

(b) 1 East, 186.

The rule being again mentioned,

LITLEDALE, J.—I have spoken to the other Judges, and we agree that the rule nisi for this mandamus ought ever to have been granted. I agree with Mr. *Austin*, that there are many cases where it would not be necessary for a conviction to be drawn up immediately on the party being in fact convicted; but on a mandamus being granted, there is no opportunity afterwards of examining into the conviction. This rule is for a mandamus, commanding an overseer to deliver over all books, &c. belonging to a parish; and the ground on which it is moved is, that he has been convicted under 4 & 5 *Will.* 4, s. 97. Now this conviction not being drawn up and annexed to the affidavits, the overseer is not in a situation to make a return that there is no such conviction, so as to examine its validity. On an application for a mandamus, under circumstances like the present, the Court ought to see that there has been a good conviction, and whether it was before persons competent to decide. It seems to me, therefore, that the conviction not being annexed to the affidavits on which this rule was granted, it ought to be discharged.

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Rule discharged.



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RAND v. VAUGHAN and DUFFIELD (*a*).

The right of the landlord, under the 11 Geo. 2, c. 19, s. 1, to follow the tenant's goods, in the case of a fraudulent and clandestine removal, does not attach unless the rent has actually become due before the removal of the goods.

THIS was an action of trespass for breaking and entering the plaintiff's house and seizing his goods. The defendants jointly pleaded not guilty, and the defendant *Duffield*, as bailiff of *Vaughan*, justified the taking under the statute 11 Geo. 2, c. 19, s. 1, as a distress for rent due on the 25th March, 1834, and stating that the goods in question were fraudulently and clandestinely carried away from the premises in respect of which the rent was due, to prevent the distress, and that the distress was taken within thirty days next ensuing such carrying away. The plaintiff replied, that the goods were carried away on the 24th March, 1834, and before the time when the rent became due and payable. Upon this fact the defendant *Duffield* took issue in his rejoinder.

At the trial before Lord Chief Justice *Tindal*, at the last Summer assizes at Guildford, a verdict was found for the defendant *Vaughan*, on the plea of not guilty, and for the plaintiff, as against the other defendant, *Duffield*, upon both the issues,—damages 10*l*.

Mr. *Platt*, in Michaelmas term last, obtained a rule calling upon the plaintiff to show cause why a verdict should not be entered for the defendant *Duffield* non obstante veredicto, on the ground that, the replication admitting the fraudulent and clandestine removal, enough remained upon the face of the plea unanswered, to preclude the plaintiff's right of action.

Mr. *Comyn* showed cause. The first section of the 11 Geo. 2, c. 19, provides, that, "in case any tenant or tenants, lessee or lessees for life or lives, term of years, at

(*a*) This case is taken, by permission, from Moore and Scott's Reports of Cases in the Common Pleas.

will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away or carry off or from such premises, his, her, or their goods or chattels, to prevent the landlord or lessor, landlords or lessors, from distraining the same *for arrears of rent so reserved, due, or made payable*, it shall and may be lawful to and for every landlord or lessor, landlords or lessors, or any person or persons by him, her, or them for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels, as aforesaid, to take and seize such goods and chattels wherever the same shall be found, as a distress for *the said arrears* of rent, and the same to sell or otherwise dispose of in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord, lessors or landlords, in and upon such premises for such *arrears* of rent." In *Watson v. Main*, 3 Esp. 15, Lord Chief Justice *Eyre* ruled that this statute did not apply to the case of a removal before the rent became due. And in *Northfield v. Nightingale*, Harr. L. & T, 321, a plea of this sort was held bad on demurrer. All the precedents state the rent to be in arrear. The right of thus following goods is a right that is contrary to the common law, and must be strictly construed. To entitle the landlord to the benefit of the statute, he must have a right to distrain at the time of the removal. It would be absurd to say that the right to follow is to attach before the right to distrain has attached: if it were so, the landlord might equally follow the tenant's goods where the removal took place two months before the accrual of the rent, as where the former event precedes the latter by only one day.

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*Mr. Platt*, in support of his rule. The good sense of

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the thing, as well as the law, concur in favour of the defendant. The statute applies wherever the removal has taken place in order to prevent the landlord's remedy, and the words of the act are—"reserved, due, or made payable." The removal in this case is admitted to have been fraudulent and clandestine. The act being remedial, the construction contended for on the part of the plaintiff is manifestly fallacious. *Watson v. Main* was disapproved by Lord Ellenborough in *Furneaux v. Fotherby*, 4 Camp. 136, where his lordship says, "that, where goods are fraudulently removed from the premises in the night, to prevent the landlord from distraining upon them for the arrears of rent to become due next morning, the case certainly comes within the mischief intended to be remedied by the statute, and there is some ground to contend that it comes within its provisions." Neither is the loose note referred to of *Northfield v. Nightingale*, the circumstances of which do not appear, to be set up in opposition to the opinion of that learned judge.

*Cur. adv. vult.*

Lord Chief Justice TINDAL now delivered the judgment of the Court :—

This was an action of trespass against two defendants, in bar of which they both pleaded a joint plea of not guilty, and the defendant *Duffield* then pleaded specially, as bailiff of *Vaughan*, the landlord, a justification under the 11 *Geo. 2*, c. 19, s. 1; the plea stating that the rent for which the distress was made became due on the 23d March, 1834, and that the goods of the plaintiff were fraudulently and clandestinely carried away to prevent the distress, and that the distress was taken within thirty days next ensuing such carrying away of the goods. The plaintiff in his replication alleged, that the goods were conveyed away on the 24th March, 1834, before the time

When the rent became due and payable, and the defendant *Duffield*, in his rejoinder, took issue on that allegation. The jury found a verdict for the defendant, *Vaughan*, on the plea of not guilty, and for the plaintiff upon both the pleas of the defendant *Duffield*, with 10*l.* damages : and the case comes before us on a motion to enter a verdict for the defendant *Duffield*, non obstante verdicto. The motion would perhaps have been more correct in point of form if it had been a motion to arrest the judgment for the plaintiff, on the ground that enough still remains upon the defendant's special plea, confessed by the plaintiff's replication, to bar the plaintiff's demand ; for, we are not aware that any instance can be produced where the defendant, after an issue which he has taken has been found against him, has been allowed to have judgment in his own favour, non obstante verdicto. But we think there is no ground whatever for the motion in the one form or the other. The short question raised by the pleadings is, whether the statute applies to cases where the tenant removes his goods fraudulently and clandestinely before the rent becomes due. And we are of opinion that such case is not provided for by the statute. By the common law, the distress for rent was necessarily made upon some part of the demised premises, otherwise the tenant might rescue the distress, or bring an action of trespass ; and it was only in case the landlord, coming to distrain, saw the cattle on the premises, and the tenant, to prevent the distress, drove them off the premises, that the landlord could justify freshly following and distraining them. And the statutes 8 *Anne*, c. 14, and 11 *Geo.* 2, c. 19, appear to have been passed with a view of removing such difficulty in the way of the landlord's remedy, in the case of a fraudulent or clandestine removal of the tenant's goods off the premises ; for it expressly empowers the landlord " to take

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and seize such goods wherever the same shall be found, as a distress for the said *arrears of rent* ; and the same to sell or otherwise dispose of in such manner as if the said goods *had been actually distrained by such landlord in and upon such premises for such arrears of rent.*" It is the *place*, therefore, not the *time* of the distress, to which the statute intends to apply the remedy : and, indeed, it is obvious, that if the construction contended for by the defendant is adopted, as the landlord may, after five days next after the distress, sell the goods and pay himself the rent, he might do so in many cases before the rent became due ; which never could have been intended. Looking to the intention of the act, therefore, and the great uncertainty which would arise if a removal of the goods at any time before the rent became due, would be sufficient to let in the provisions of the act (for if at any time, *how long* before would be the question), we think the present distress was illegal. We therefore hold the law to have been correctly laid down by Lord Chief Justice *Eyre* in *Watson v. Main*, 3 Esp. 16, upon which Lord *Ellenborough* appears to have doubted only, but to have expressed no opinion in *Furneaux v. Fotherby*, 3 Camp. 136.

Rule discharged.

## TRINITY TERM,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

The KING v. The Inhabitants of the Parish of MABE,  
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UPON appeal against an order of two justices of the borough of Penryn, for the removal of *Nicholas Halvosso*, his wife and children, from Penryn to Mabe, the Court of Quarter Sessions for Cornwall made an order, which stated as follows:

It appeared to this Court, that by indenture duly executed, bearing date 16th October, 1799, and since lost, *Nicholas Halvosso*, then being about fifteen years of age, was stated to be bound apprentice, with the consent of his surviving parent, to *Thomas Bolitho*, of the parish of St. Gluvias, tanner, until he should attain the age of twenty-one; that no sum of money or value was given or contracted for with or in relation to the said apprentice; that the said indenture was stamped with the several stamps impressed on indentures of that class by the several statutes prior to 37 Geo. 3, c. 111, amounting to 10s.; but this Court considering it liable, under that act, to an additional stamp duty of 10s., held that it ought not to be received in evidence. And upon hearing what could be alleged and proved on either side, it is ordered and adjudged by this Court, that the said order be, and the same is hereby, on the merits, con-

The proviso in 37 Geo. 3, c. 111, exempting from the stamp duties thereby imposed, every indenture of apprenticeship "where a sum or value not exceeding 10l. shall be given or contracted with or in relation to the apprentice," does not extend to an indenture where no consideration passes.

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firmed, subject to the opinion of the Court of King's Bench (a).

This order of sessions was brought up by certiorari, and a rule nisi to quash it was granted.

*Bere* now argued in support of the order of sessions. The simple question in this case is, whether the indenture was liable to the additional duty of 10s., imposed by sect. 1 of 37 *Geo. 3*, c. 111, (which was in force at the time of executing this indenture,) or whether it is within the exception created by sect. 3. Sect. 1 imposes the additional duty, generally, upon every deed which should be made after 1st August, 1797. Sect. 3 provides, "that nothing in that act contained shall be construed to extend to (inter alia) any indenture of apprenticeship *where a sum or value, not exceeding 10l., shall be given or contracted* with or in relation to the apprentice." Here, *no* sum or value whatever was given or contracted: Consequently this indenture is not within the exception. It will be urged, contra, that the spirit and intention of the act was to exempt all indentures where there should be *no* consideration, as well as those where there should be a consideration under 10l.; but the words of the statute will not, without distortion, bear this construction; and the judges of this Court have lately said, that they will rather adhere to the plain meaning of the words of a statute, than put a forced construction upon them, for the purpose of giving effect to the *supposed* spirit and intention. The legislature appears to have subsequently *discovered*, that by the words of this act they had imposed a higher duty where there was a total absence of consideration, than where there was a small consideration; for in the subsequent acts, (48 *Geo. 3*,

(a) *Patleson, J.*, upon the case being read, observed, that no settlement of the pauper in the respondent parish was stated.

Upon this it was agreed by the counsel, that the case should be considered as amended in this respect.

c. 149, and 55 Geo. 3, c. 184,) it is expressly provided, that in cases where there is *no* consideration, the same duty only shall be paid as in the cases where the consideration is of the lowest specified amount. In *Wood v. Norton* (a), this Court thought themselves bound to put a *strict* construction upon the Stamp Act of 55 Geo. 3, and to require a stamp in a case clearly not within the *spirit and intention* of the act. There, a mortgage and a bond were given to secure the same sum of money, and were executed at the same time, but did not bear the *same date*. It was held that the bond was not,—within the meaning of 55 Geo. 3, c. 184, sched. part 1,—a bond “given as a security for the payment of any sum of money, in part secured by a mortgage or other instrument, *bearing even date with such bond*.”

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*Crowder*, contra. Upon a *reasonable* construction of the language of this proviso, it is submitted that it is clear that the deed is within the exemption. The fair meaning is, that the additional duty shall not be imposed in any case where there shall not be a consideration exceeding 10*l.*,—which will include this case. Such a technical and unfair construction as is now sought to be put upon the proviso, cannot have been contemplated by the legislature; and on the other hand, there can be no doubt that the legislature meant to use the words in the same sense as if they had said, “where *no sum exceeding 10*l.**” &c. This is a clause exempting from a burthen, and therefore the Court must carry the intention into effect, if they possibly can do so. In many acts of parliament the word “or” has been construed to mean “and,” (b)—et vice versa,—in order to give effect to the spirit and intention of the act. *Wood v. Norton*

(a) 4 Mann. & Ryl. 673; 9 Barn. & Cressw. 885.

(b) SEU, pro *et*, conjunctivâ, occurrit passim, in verbo *Ducange*.

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affords no criterion by which the present case can be decided.

Lord DENMAN, C. J.—This is an evident *mistake* in the act, but we have no power to correct a mistake of the legislature. According to the only construction which we can put on this proviso, it operates to exempt only money contracts, (or contracts for other valuable consideration,) of a certain limited amount.

The other judges concurring,

Order of Sessions confirmed.

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REX v. MONMOUTHSHIRE CANAL NAVIGATION  
COMPANY.

By a local act for making a canal, it is enacted that the rates, tolls, and duties, authorized to be taken by the Company of Proprietors, shall not at any time or

UPON appeal, a poor-rate for the borough of Newport, whereby the Company of Proprietors of the Monmouthshire Canal Navigation were rated in the sum of 100*l.*, as the occupiers of part of the canal, and a certain house, tram-road, weighing-machine, and coal-house, lying within the borough, was confirmed, subject to the following case:

times hereafter be charged with, or be subject or liable to, the payment of any parochial rates whatsoever, and that the Company “shall *from time to time* be rated to all parochial rates, for and in respect of the *lands and grounds* to be purchased or taken, and the warehouses and other buildings to be erected or set up by the said Company or their successors, in pursuance of this act, in such and the same proportion as, but not at any higher value or improved rent than, *other lands, grounds, and buildings, lying near or adjacent thereto, are or shall for the time being be rated, and as the lands, grounds, warehouses, and other hereditaments, so to be purchased and taken and erected, would have been ratable, in case the same had continued in their former state,* and not been used for the purpose of the said navigation or undertaking.”

Held, first, that the proprietors of the canal were liable to be rated at the *fluctuating* value of the adjacent lands and buildings, and not at the value which the adjacent lands and buildings possessed at the time when the act was passed.

Secondly, that the value of the adjacent lands was to be estimated from *whatever* source it might arise, and that the increase of value arising from the formation of the canal was not to be excluded from the calculation.

By 32 Geo. 3, c. cii, the Company were incorporated and empowered, inter alia, to make and keep navigable a canal from "some place near Pontnewynydd, in the county of Monmouth, into the River Usk, at or near Newport," and to purchase lands for the use of the undertaking; and by sections 91 and 95 the Company were empowered to take certain tolls. By section 101 it is enacted, "that the said rates, tolls and duties, by this act granted and authorized to be taken by the said Company of Proprietors as aforesaid, shall not at any time or times hereafter be charged with or be liable to the payment of any parliamentary or parochial rates, taxes, assessments, or impositions whatsoever; and that the said Company shall *from time to time* be rated to all parliamentary and parochial rates, taxes, assessments, and impositions, for and in respect of the *lands* to be purchased or taken, and the *warehouses and other buildings* to be erected by the Company in pursuance of this act, in the same proportion as, but not at any higher value or improved rent than, other lands, grounds, and buildings, lying near or adjacent thereto, are or shall *for the time being* be rated, and as the lands, warehouses, and other buildings, so to be purchased and taken and erected, would have been ratable in case the same had continued in their *former state*, and not been used for the purposes of the said navigation."

By virtue of this act, the Company purchased lands and made the intended canal,—part of which lies within the borough, and is included in the said rate. It afterwards becoming expedient to extend the canal, the Company were empowered by 37 Geo. 3, c. 100, to extend the canal about half a mile, and to purchase land for that purpose. And it was thereby further enacted, that the Company might demand the aforesaid tolls, and that the several clauses and exemptions contained in the 32

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*Geo. 3, c. cii*, should extend to the canal thereby authorized to be made(*a*).

By virtue of the last-mentioned act, the Company extended their canal; and so much of the land taken for the purpose of the extension as lies within the borough, is also included in the rate in question.

By 42 *Geo. 3, c. cxv*, reciting the before-mentioned statutes, and that it was expedient that a railway should be made from Sirhowy Furnaces, in the parish of Bed-

(*a*) The words of the clause are as follows:—"And that the said recited act," (32 *Geo. 3, c. cii.*) "and the several clauses, powers, authorities, provisoes, orders, rules, regulations, limitations, exemptions, restrictions, privileges, penalties, forfeitures, punishments, and provisions, therein contained, shall, (so far as the same will apply, and the nature and circumstances of the case will admit, and so far as the same are not repealed, altered, re-enacted, or otherwise provided for, in and by this present act,) extend to the said canal and other works hereby authorized; and shall take effect, operate, and be put in execution, and shall be used and exercised by the said Company of Proprietors, and their agents &c., and shall be applied and enforced in, by, and for and in respect of the making, completing, repairing, preserving, maintaining, and using the said canal and other works hereby authorized, and for supplying the same with water, and for regulating the navigation thereon, and for the punishment

of offences relating thereto, and for the purchasing, selling, and conveying of lands, tenements, and hereditaments, and ascertaining the value thereof, and for determining and assessing damages, as well as with respect to all other matters and things whatsoever in any way touching or concerning the said canal and other works hereby authorized to be made, in such and the same manner, in all respects, and as fully and effectually as if the same clauses, powers, authorities, provisoes, orders, rules, regulations, limitations, exemptions, restrictions, privileges, penalties, forfeitures, punishments, and provisions, had been inserted, repeated, and enacted at full length in and by this present act, and as if the canal and other works, hereby authorized to be made and maintained, had been authorized to be made and maintained in and by the said recited act, or been part of the canals and works thereby authorized to be made and maintained."

o communicate with the canal and the River or near Newport, together with certain branches y from the last-mentioned railway to other places, incorporating "The Sirhowy Tram-road Com- he Monmouthshire Canal Company were em- to purchase lands, and to make a certain portion ast-mentioned railway; and by section 3 it was , that the Sirhowy Tram-road Company and the thshire Canal Company respectively, might ch tolls and duties for the tonnage of certain ities conveyed on the said railways or tram-roads, Monmouthshire Canal Company were by 32 c. cii, empowered to take for the tonnage and e of the like articles conveyed on the canals ways thereby authorized to be made. The act ovided that the several clauses of the 32 Geo. 3 extend to this act (a).

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e clause thus proceed- and shall respectively and the like powers edies for recovering the s and duties hereby au- to be demanded and are given by the first- d act for recovering the ls, and duties therein d. And that the first- d act, and the several owers, authorities, re- limitations, exemp- rictions, privileges, pe- rfeitures, punishments, sions, therein contain- so far as the same will d the nature and cir- s of the case will admit, r as the same are not altered, re-enacted, or : provided for in and by ent act, extend to the

railways and tram-roads, and other works hereby authorized to be made by the said Sirhowy Tram-road Company, and the said Company of the Monmouthshire Canal Navigation respectively, and shall take effect, operate, and be put in execution, and shall be used and exercised by the same Companies respectively, and their respective agents &c., and shall be applied and enforced in, by, and for and in respect of the making, completing, repairing, preserving, maintaining, and using the said railways or tram-roads &c. hereby &c. by them respectively; and for regulating the carriage or conveyance of goods thereon; and for the punishment of offences relating thereto; and for the purchasing, selling, and con-

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By virtue of the last-mentioned act, the Monmouthshire Canal Navigation Company made a portion of the last-mentioned railways, and a part of that portion within the borough, and is included in the rate.

Before and at the time of the formation of the canal and railways, the land purchased by the Company for the purposes of the canal and railways, and the land on each side of it, was of very much less value than at the present time. The whole of the land taken for the railways, and a part of the land taken for the purposes of the original canal, were then used for agricultural purposes, and let at the rent usually given for good arable land in the neighbourhood of towns. Other portions of the land taken for the original canal was, at the time it was so taken, used as wharf-ground to the River

for the surveying of lands, &c., and ascertaining the value thereof; and for the determining and assessing of damages, as well as with respect to all other matters and things whatsoever in any wise touching or concerning the said railways or tram-roads &c., hereby authorized by the said Companies respectively, in such and the same manner, in all respects, and as fully and effectually to all intents and purposes as if the same clauses, powers, authorities, regulations, limitations, exemptions, restrictions, privileges, penalties, forfeitures, punishments, and provisions, had been inserted, repeated, and enacted at full length, in and by this present act, and been hereby made applicable to the Sirhowy Tram-road Company as well as to the Monmouthshire Canal Navigation Company, and as if

the said railways or tram-roads &c., hereby authorized by the said last-mentioned act, had been authorized to be made by them in pursuance of the first-mentioned act, (1 Geo. 3, c. cii,) or been authorized to be made by the said railways and other works hereby authorized to be made by them, and as if the said railways or tram-roads, and works hereby authorized to be made by the Sirhowy Tram-road Company, had been part of the railway and other works authorized to be made by the first-mentioned act, and the said Sirhowy Tram-road Company had been therein named and authorized to make the same, and as if the words "of the Monmouthshire Canal Navigation Company" in the former part of this clause had been omitted." 185, *in notis*.

Other part of the same land then formed a part of the streets of the borough; but in consequence of the formation of the canal and railways, great alterations have been made in the lands adjacent to the canal, as to the manner of their occupation, and the purposes which they are used; and by means thereof their present annual value is very much greater than it was at the time of the formation of the canal and railways. An increase in the value of such land has also since arisen from other local causes, independent of the canal. The canal runs for some distance within the borough of Newport, parallel with the Usk, which, before the formation of the canal, was and ever since has been used as a navigable river; and when the canal was formed, there was left between the canal and the river, for the purpose of making wharfs, a convenient space, on which wharfs have been constructed, but not by the Canal Company. At these wharfs the coals and other goods conveyed along the canal are landed, and loaded in vessels lying in the river, and goods conveyed in vessels up the river are landed and loaded in boats on the canal. On the opposite side of the canal, dwelling-houses have been erected, and yards and docks formed, extending for a considerable distance along the canal within the borough; none of which belong to the appellants. The wharfs, houses, yards, and docks, are now of great annual value. Some part of the lands adjacent to the canal within the borough still continues to be used for agricultural purposes.

Until the present rate was made, the appellants had been rated at 5*l.* 5*s.* only. By the present rate they are rated for the lands taken by them by virtue of the 32 *Geo.* 3, c. cii, according to the present improved actual value of the lands and premises adjacent to the canal, and for the lands taken by them under 37 *Geo.* 3, and 42

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Whether  
clause of ex-  
emption is  
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Second point:  
Value, how to  
be estimated.

Third point:  
Whether rat-  
able in pro-  
portion to the  
*improved* va-  
lue of adjoin-  
ing premises.

*Geo. 3, c. 115*, at the improved actual value of the lands so taken, arising from such lands being used for the purposes of the last-mentioned acts.

Upon the hearing of the appeal it was contended by the appellants,

*First*, that the provisions contained in the 101st section of the 32 *Geo. 3, c. cii*, were *incorporated* in the 37 *Geo. 3, c. 100*, and 42 *Geo. 3, c. cxv*, or in one of them, so as to exempt the lands taken by them under the last-mentioned acts from being rated according to their actual improved value, arising from the tolls received by the Canal Company.

*Secondly*, that they were only liable to be rated in proportion to the actual value of the adjacent lands, at the time when the lands held by the appellants were *originally* taken for the purpose of the canal or railways under the act.

*Thirdly*, that at all events they were only liable to be rated in proportion to such value as the adjacent lands would now possess, supposing the canal and railroads had not been made, and the adjacent lands had continued in their former state, and were now used for the same purposes as at the time when the lands were taken by the appellants; and that any increase of value, arising from or depending upon the existence of the canal or railroads, ought not to be taken into consideration in ascertaining the value of the adjacent lands, for the purpose of fixing the sum at which the appellants ought to be rated.

If the Court shall be of opinion with the appellants, on the first and second or first and third points, made by them as aforesaid, then the rate is to be amended by reducing the sum at which the appellants are now rated, from 100*l.* to 5*l. 5s.*

The acts of the 32 Geo. 3, c. cii, 37 Geo. 3, c. 100, and 42 Geo. 3, c. cxv, are to be taken as part of the case.

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*Maule and Talbot* in support of the order of sessions.

The first question is, whether the 101st section of the 32 Geo. 3, (the exempting clause,) is incorporated into the subsequent acts. From the later statutes it is evident that this was a *prosperous* undertaking. An exemption of a party from a common burthen, ought not to be extended by construction. A case upon this very act of parliament, which is not reported (a), shews the insufficiency of general words, to incorporate provisions in a preceding act containing unusual powers.

First point.

The second question for the determination of the Court is, whether the appellants are ratable at the value only of the lands when originally taken. The *respondents* contend, that the *appellants* are to be rated according to the *fluctuating* value of the adjacent land. The statute directs that the Company shall *from time to time* be rated to all parochial rates. The words, "from time to time," must have reference to a future period. Unless these words are struck out, the proposition of the appellant, that the rate is *fixed*, is not maintainable. Then the clause proceeds thus, "in such and the same proportion as, but not at any higher value or improved rent than, other lands and grounds, and buildings, lying near or adjacent thereto, are or *shall for the time being be rated.*" Looking at the collocation of these words, "shall for the time being be rated," it is evident that the legislature intended that the Company should be rated according to a *fluctuating* value. But if, as will be contended on the other side, the value at the time of passing the act is to be the criterion of the ratable amount, how is that provision of the statute to be com-

Second point.

(a) See a note of the case at the end of this Report.

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plied with which directs that buildings *to be erected* by the Company, shall be rated in proportion as other buildings adjacent thereto shall be rated? The buildings might not be erected for years, and yet, according to the construction contended for, they are to be rated in the same proportion as other pre-existing buildings were rated at the time that the act passed. It cannot be said that the sites of these future buildings are to be rated by anticipation, according to the then existing value of the adjacent buildings. [Lord Denman, C. J. It might mean, that the warehouses to be erected were to be rated as the adjacent warehouses were rated.] It does not appear that there were any adjacent warehouses. There is no reason, on the score of justice, which should require any other construction than that which will subject the Company to be rated as the owners of the adjacent lands are. The object of the clause was evidently two-fold, first, that the *tolls* should not be rated; and secondly, that the inhabitants of the parish should not be deprived of the right of rating the *land*, that is, the fluctuating value of the land, which they previously possessed. The undertaking is exempted from being rated for the tolls, and justice requires that the other object of the statute should be fully carried into effect. The respondents contend that the proprietors of the canal should be rated in the same manner as if they possessed the land covered by the canal, and the canal had been at a distance of 100 yards to the right or left. There are several cases upon acts of parliament, containing provisions similar to the clause under discussion in this statute, in all of which the companies, if ratable at all, have been held to be ratable according to the *fluctuating* value of the adjacent property. *Rex v. The Regent's Canal Company (a)*, *Rex v. The Grand*

(a) 9 Dowl. & Ryl. 760; 6 Barn. & Cressw. 720.

*Junction Canal Company (a)*, *Rex v. The Inhabitants of St. Mary, Leicester (b)*, *Rex v. The Leeds and Liverpool Canal Company (c)*. *Rex v. Chelmer and Blackwater Navigation Company*. The question in those cases was between a rating according to the value of the adjacent lands, or a rating upon the improved value derived from the tolls: A rating upon the original value has never been suggested till the present case. If the legislature had intended that the Company should be rated by so absurd a standard as the value of the land when *originally* taken, it would have been easy to express such an intention distinctly. From the judgment of *Abbott, C. J.*, in *Rex v. The Birmingham Canal Company (d)*, it appears that clauses of this description, which contain an *exemption*, are to be construed strictly. In the *Stourbridge Canal Company v. Wheeley (e)*, it was held, that acts of parliament of this description are to be considered as a *bargain* between the proprietors and the public, and that the rule of construction is, that any *ambiguity* in the terms of the contract must operate *against the proprietors*, and in favour of the public. Suppose the whole of the canal and the adjacent lands should become an unprofitable swamp, it never could be intended that, in such a state of circumstances, this canal Company should continue to pay rates. *Rex v. The Calder and Hebble Navigation Company (f)*, is distinguishable. There, the question was, whether the Company were altogether exempt from parochial rates; here, it is a question of *proportion*.

The third point for which the appellants contend is, Third point. that the Company are only ratable according to the value which the adjacent lands would now possess, if

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(a) 1 Barn. &amp; Ald. 289.

(b) 6 Maule &amp; Selw. 400.

(c) 5 East, 325.

(d) 2 Barn. &amp; Alders. 578.

(e) 2 Barn. &amp; Adol. 792.

(f) 1 Barn. &amp; Alders. 263.

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the canal had not been made. This proposition, which assumes ratability according to the fluctuating value of the adjacent property, involves an insoluble problem; for it is impossible to say what proportion of the increase in value has arisen from the effect of the corn laws, the import and export duties, and other causes, and what proportion arises from the existence of the canal. The appellants seek to apply the words which direct that the *lands purchased* shall be ratable "as if they continued in their former state," to the preceding part of the clause, which speaks of the *adjacent lands*. At all events, the language of the clause is *ambiguous*, and if so, according to the principle of construction already alluded to, the ambiguity must operate against the Company, and in favour of the public.

First point.

*Greaves*, contra. The exemption clause is incorporated into the subsequent statutes. The case cited, as having been decided on the 128th section, is very unsatisfactory: Neither the arguments of the counsel nor the reasons of the judges are stated. It is impossible, therefore, to say on what grounds the decision proceeded; but it is clearly distinguishable from this case. [Lord *Denman*, C. J. We do not feel any difficulty on that point.]

Second point.

The appellants are only liable to be rated at the value which the lands taken by them, and the adjacent lands, possessed at *the time when they were first taken* for the purpose of the appellants. The proper way to arrive at the true construction of the exempting clause is, not to look at the state of facts, which *now* exists, but to contemplate the circumstances and law as they subsisted at the time when the act was passed. Now, what were the circumstances when this act passed? Here was a company entering into a hazardous enterprise of great

itude, and incurring great expense, and it was impossible to foresee whether the undertaking would be table or not. It was reasonable, therefore, that should take every precaution in their power to free selves from all burthens likely to diminish the probability of the success of their undertaking. On the other hand, the parishes through which the canal was intended to pass were interested in not being deprived of a rate which the lands to be taken for the canal then bore. What then could be more natural than that the parishes should say to the Company, "Unless you will give us the *same* rates which we now receive, we will oppose your undertaking." And what more reasonable than that the Company should answer, "We are willing to pay you, at all times, the rate you now receive; but as you do not choose to incur any risk yourselves, and as you are to have the same rate you now have, even if the undertaking prove unsuccessful, it is fair that if it prove prosperous, we should reap the benefit of it. If, on the one hand, you are *in no case to be benefited*, on the other hand, you ought *in no case to be benefited*." No agreement can be suggested which would be more reasonable than this; and the more so, because, if the undertaking succeeded, the parishes would reap sufficient benefit from the value of *other* lands being increased by means of the canal. Besides, the statute recites, that the canal will be of great public benefit, and it is but just that those who cause such benefit should be protected to the greatest extent, consistently with the rights of individuals. By leaving the rate at the same amount as when the act passed, the Company will be protected to the greatest extent, without injury to individuals. The principle on which the act is now framed is, to take the actual value of the lands, *from whatever source arising*, as the cri-

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terion of the rate. Suppose that the actual value of such adjacent lands should, by extraneous circumstances, be so increased, that such value was greater than the value of the canal. According to the principle of the present rate, the Company must be rated according to that value,—which is absurd,—because then this clause of exemption, instead of being beneficial, would impose a greater burthen on the Company than they would be liable to under the 43d *Eliz.* Again, suppose a railway, like the *Manchester and Liverpool Railway*, should be made through the same district as the canal, and should run parallel and near to it, and that such railway should so interfere with the traffic on the canal, as that the profits should be less than the expenditure, yet, if the value of the adjacent lands continued the same as it now is, the Company must still, according to the argument on the other side, be rated as they now are, which never could have been the intention of the legislature. [Lord *Denman*, C. J. It is easy to put extreme cases on both sides. Suppose some noxious manufactory were established near the canal, so as entirely to destroy the value of the adjacent lands.] According to the principle which the *appellants* contend for, the parish would lose nothing, because the same rate which was paid before the canal was made, would still be payable. That supposition, therefore, fortifies the argument, for it shews that the principle contended for, will, under all circumstances, be fair; whereas, according to the principle of the present rate, although the Company's profits were enormous, they would, in such a case, pay *no* rate. Again, the Company are empowered to make reservoirs, feeders, locks, and aqueducts; but the only toll they can take is a mileage toll. Suppose the Company had in any parish a reservoir of 100 acres, and that the adjoining lands were now become very valuable, is it to

be contended that the Company are to be rated according to the improved value of such adjacent lands, when they not only receive no benefit from such reservoir, but have sunk a large sum in the purchase of it, and yearly lose the interest of that sum, together with the expenses necessary to keep it in repair? At the time when this act passed, it was generally considered that tolls were ratable per se; and there was a decision, which was supposed to sanction that opinion, in *Rex v. Page* (a). In the same year this act passed, and probably in consequence of such opinion the first part of the clause in question was introduced. It has been held, that a precisely similar clause exempts a canal from the payment of any rates at all; *Rex v. Calder and Hebble Navigation Company* (b). If, therefore, the clause had stopped there, no rates would have been payable by the appellants; it is therefore a *repeal* of the 43 *Eliz. c. 2, s. 1*; and the subsequent part of the clause, instead of being an exempting clause, is a clause *affirmatively* imposing rates on the Company, and it is therefore to be construed, like all such clauses, *strictly* as regards the parish, and *favourably* for the Company. This is an answer to the argument on the other side, that any ambiguity must operate against the Company, and in favour of the parish. But then the clause further provides, that the Company shall be rated in the same proportion as other lands adjacent are, or shall for the time being be rated; but it does not stop there, but goes on, "and as the lands, &c., would have been ratable if they had continued in their former state." Two things, therefore, are given, whereby the rate is to be ascertained—the rate on the *adjacent lands*, and that on the *lands taken for the canal*. The present rate, being founded on the actual value of the

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(a) 4 T. R. 543.

(b) 1 Barn. &amp; Alders. 263.

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adjacent lands *only*, is clearly wrong; for it is on one, instead of both the means of ascertaining the rate. Besides, the rate is to be upon the canal lands as if they had continued in their *former* state, the moment, therefore, that they were appropriated for the purposes of the canal, their value was *fixed*, and after that time could never change, except in consequence of the formation of the canal. But it is said, that the words "for the time being" make the rate fluctuate according to the value of the adjacent lands. That is not so. It is clear that the framers of this act knew how to provide for all future time, for in the first sentence of the clause they use the expression "at any time or times hereafter." And in the second, when they speak of the rates, which of necessity must be at all times after the act, it is "from time to time;" but in the *very same* sentence, when they point out the mode of calculating the rates, it is "for the time being." That variation in the expression, evidently indicates a different purpose in the one instance and in the other. If the words had been "are rated" only, it might have been contended that the Company were liable to no rate for lands which were not actually rated at the time when the act passed. It appears that part of the land taken was a street, and therefore, at that time, not rated at all. It was, therefore, necessary to introduce the words "for the time being," to meet such a case. The words being in the singular number also, can only be applied with propriety to *one* instance, and the proper construction is, that the rate is to be according to the rate on the lands when taken, if there be one at that time, or if there be not, then according to the *first rate* after they are taken. The same rule will be found equally applicable to warehouses, which have been built subsequently to the passing of the act. These arguments do not rest simply on the con-

sideration of this clause, but it will be found, that there has been one uniform and concurrent opinion among all the Judges who have given opinions on the construction of canal acts, viz. that the company, in each case, is to be rated according to the value of the lands at the time when they were first taken. On reference to the cases it will be found that there is no clause so strongly in favour of the Company as this. There is no clause in any act containing the first sentence or the last. Some effect, therefore, must be given to these additional provisions, which must have been inserted for the benefit of the Canal Company.

As to the third point, it is true that it is not very formally raised, but that arises from the great difficulty there was in settling the case. The appellants contend that it is quite clear that it never was the intention that their lands should be rated according to any increase of value arising *from the canal*; for the rate is to be as if the lands had continued in their *former* state, and had not been used for the purposes of the canal. The present rate, therefore, is wrong, as including a value, which principally, if not entirely, arises from the existence of the canal. And the judgments of Lord *Ellenborough*, *Lawrence*, J., and *Le Blanc*, J. in *Rex v. Leeds* (a); the judgments of Lord *Ellenborough*, *Bayley*, J., and *Abbott*, J., in *Rex v. The Grand Junction Canal Company* (b); the judgment of *Bayley*, J. in *Rex v. St. Peter the Great, Worcester* (c); the case of *Rex v. St. Mary, Leicester* (d); the judgment of *Bayley*, J. in *Rex v. The Regent's Canal Company* (e); and the case

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(a) 5 East, 325.

(d) 6 M. &amp; S. 400.

(b) 1 Barn. &amp; Alders. 289.

(e) 9 Dowl. &amp; Ryl. 760;

(c) 8 Dowl. &amp; Ryl. 331; S. C. 6 Barn. &amp; Cressw. 720.

S. C. 5 Barn. &amp; Cressw. 473.

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of *Rex v. Chelmer and Blackwater Navigation Company* (a), were referred to.

First point.

Lord DENMAN, C. J.—I think that there can be no substantial doubt on the first point. The exemption is incorporated in the subsequent acts. This is manifestly distinguishable from the case cited.

Second point.

The next question is as to the construction of the 101st clause, upon which it is contended on the part of the appellants that they are only liable to be rated according to the value of the lands when taken,—that is, that for all time, the Company are only to be rated according to the actual amount, and in proportion to the value of the lands—at the time when they were taken. If that had been the intention of the legislature, it would have been better to have put a certain estimate on the lands. It would have been easy to have said that the land shall hereafter be rated at so much per acre. It would be exceedingly difficult at the present time to determine what was the value of the neighbouring lands at the period when the canal was formed. But it is said that the words are clear and explicit on this subject. If they are so, they are, in my opinion, clear and explicit the other way, because the clause provides that the lands to be taken shall be rated “in such and the same proportion as (but not at any higher value or improved rent than) other lands, grounds, and buildings, lying near or adjacent thereto, *are or shall for the time being* be rated.” Two periods are here contemplated during which the lands and buildings shall be rated; not only the time of the passing of the act, but also all future time. The standard of rating being the *fluctuating* value with reference to the adjacent lands, how can it be contended

(a) 2 Barn. & Adol. 14.

that *these* lands are to be rated according to the value when they were taken? The clause proceeds,—“and as the lands, buildings, &c. so to be purchased and taken and erected, would have been ratable in case the same had continued in their former state, and not been used for the purposes of the said navigation or undertaking.” It does not say that they shall only be so rated as if the undertaking had never been carried into effect. It is impossible to give effect to the whole of the words, but it is extremely easy to see what the legislature intended, namely, that the Company should pay the same rates as a similar description of lands would have paid if those lands had never been taken for the canal. Mr. *Greaves* has with great ingenuity and industry referred to many cases to shew that the time when the lands were taken is the time to look at. But if we attend to the object of those cases, that will appear not to be a fair construction. The Court were not considering the question which we are now considering, but only the question of *ratability*; and though they say that the lands should be liable to be rated only according to their value when taken, that language is to be applied to the liability and not to the rating. The rate is to be according to the value from time to time. The language of the judges is, however, certainly open to the construction contended for.

The third point is, that at all events the Canal Company were only liable to be rated in proportion to such value as the adjacent lands would now possess, supposing the canal and railways had not been made, but the adjacent lands had continued in their former state, and were now used for the same purposes as they were at the time when the lands were taken by the Company; and that any increase of value arising from or depending upon the existence of the canal or railways, ought not

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to be taken into consideration in ascertaining the value of the adjacent lands for the purpose of fixing the sum at which the Canal Company ought to be rated. The words of the clause are not such as these, and do not carry that import with them. The term used in the clause is not "rated," but "ratable," that is, *liable* to be rated. The Company are liable to be rated according to the increase or diminution of value of the adjacent lands. That being so, the question is, whether we are authorized to introduce this condition, that they are only to be rated according to the value of the adjacent lands, such value not arising from the canal. Those are not the words in the act, and there is no reason why they should be inserted. If they were so inserted, the parish and the owners of neighbouring lands would be losers.

First point.

On the first point the appellants are right; on the two latter the sessions have decided quite correctly.

LITLEDALE, J.—With regard to the first point I have no doubt whatever. I do not think it necessary to point out what the effective words of the incorporating clauses are; they seem to me complete to all possible purposes to incorporate the clause. Allusion has been made to a case. That was a very difficult case:—A power was given to make cuts communicating with the canal under particular circumstances; the line of the canal was to be extended, and the question was, whether those powers were to be extended to the new canal.

Second point.

The second point is, that the Company were only liable to be rated in proportion to the actual value of the adjacent lands at the time when the lands which they now occupy were originally taken by them; I have not the slightest doubt as to this. The 101st

section says, first, that the tolls are to be free from rates; then that the Company shall be rated to all parochial rates in respect of the lands to be taken and the buildings to be erected, in such and the same proportion as (but not at any higher value than) lands and buildings adjacent thereto are rated. If this clause had stopped at these words "are rated," some doubt might have been raised, whether they were not to be rated according to the value when the lands were taken. But I do not think that even in such a case it is clear that would be so. The words "are rated" are however followed by the words "or shall for the time being be rated." That refers not only to present but future time. The rate must go on from time to time. It is now upwards of 40 years since the act passed. I do not see how it is possible to ascertain what the value of the land was when the act passed. I am very clearly of opinion that the true construction is, that you are to take the fluctuating value.

With regard to the third question, there is more difficulty. The case states that the value of the property has increased by a variety of means and circumstances. It is contended by the appellants, that the increased value of the adjacent lands is only to be taken *from other circumstances*, and that the increase of value *from the canal* ought not to be taken into account. There is some doubt from the words, "and as the lands so to be taken and purchased would have been ratable in case the same had continued in their former state." It is said that the meaning of these words is, that the improved value of the lands, supposing that the canal had not been made, is to be taken. That appears to me not to be their meaning. The increased value of the lands is, in my opinion, to be taken—from whatever cause it arises. At the time of passing this act

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some doubt existed as to whether tolls were ratable per se. The act clearly intended to exempt tolls at all events, and the framers of the act may have thought that though they had exempted the tolls, yet if they had said nothing as to the lands, a doubt might have arisen as to whether those lands, as increased by the value of the tolls, might not be ratable; or whether, if a toll-house were erected on the land, the rate might not be increased on account of the value of the tolls received. The meaning of the latter part of the act is, that the land shall be ratable *as mere land*. The Company have taken so many acres of land, and are to be exempt altogether from the payment of rates on the tolls; but the lands they possess are to be rated at the value of the adjacent lands. There is, however, great doubt (arising from the inaccurate wording of the clause,) as to how the value of the adjacent land is to be estimated. Is the value of the adjacent lands to be taken *without* the addition made by means of the canal, or *with* the addition? How are the adjacent lands now increased in value? From two causes; by means of the canal, and by means of other circumstances. The meaning of the clause, I think, is, that the value, as it is *altogether*, is to be taken. I do not see how it is possible to ascertain how much the value has increased from one, and how much from the other cause. The proper mode of rating the canal is upon the supposition, that instead of the canal being made where it is, it was 100 yards off, and the present value of the land 100 yards off is to be taken as the value of the land upon which the canal is situated.

First point.

PATTESON, J.—On the first point I am with the appellants. The precise ground on which the case cited was decided is not known. There is this distinction

between that and the present case, that there the question arose on the 128th section, and the Court thought that the incorporating clause in the act of 42 Geo. 3, did not extend to *that* clause. I do not see exactly the reason for the decision, but it is enough to say that the two cases are not alike.

With regard to the other points, I cannot make sense altogether of the clause, though, upon the whole, it is more nearly intelligible than those clauses generally are. The intention and object of the act was, that the Company should not be rated in respect of the tolls. The discussion in all the cases cited by Mr. *Greaves* was, whether the premises were to be rated, taking into consideration the value of the tolls. Mr. *Greaves* has argued upon the difference in the forms of expression used in different parts of this clause; first, there is "at any time or times hereafter," then "from time to time," and presently for the "time being." But what can this last expression by possibility mean, as it is here used, but the same as "from time to time?" The enactment is, that the lands, warehouses, and other buildings *to be* erected, (not *now* erected,) are to be rated as other lands, grounds, warehouses, and buildings, *are or shall for the time being* be rated. If the clause had stopped there, no doubt could have existed but that the Company were to be rated in the same way as if the lands and warehouses were in the hands of any private person; but it goes on to say, "and as the lands and grounds, warehouses and buildings, would have been ratable if they had continued in their former state." That is impossible, because the *warehouses to be erected* cannot be rated in the same way as if they had continued in their former state, for they had no former state, and had not been used before. They are ratable in the same manner as other land,

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that is to say, as if they were not in the hands of the Company. That is the real meaning of the act.

To the third question the answer has been given,—that the thing is impossible. No person can possibly tell what is the value of the lands without including the value arising from the canal. The legislature cannot have intended what was impossible.

First point.

WILLIAMS, J.—Upon the question of incorporation I am entirely of the same opinion. No doubt whatever can be entertained. All the words that can be introduced are to be found in the clause in question.

Second point.

Nor is there more doubt on the second point. Mr. *Greaves* very properly brought under the consideration of the Court the several cases that have been decided, for the purpose of inducing us to suppose that the period to be looked at, is the period of the formation of the canal or of the taking of the lands. Those cases depended upon the language of each act. This particular one must depend on, and be regulated by, the language in the particular statute itself. Upon that, it is impossible to suppose that the time of making the canal is the point of time to which we are to look to ascertain the amount of assessment. The property is to be rated from time to time according to the fluctuating value of the adjacent lands.

Third point.

With regard to the third point, almost all the observations as to the second apply, with this, that it introduces another subject more intractable and more impossible, namely, the extinction of the canal by supposition—a state of things I do not know how we are to deal with.

The result is, that as to the second and third points we are against the appellants, and therefore the rate is to remain confirmed.

Rate confirmed.

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an order of the Lord Chancellor made in these causes, 1822, a case was made for the opinion of the Court, as:

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3, an act passed for making and maintaining a canal near Pontnewynydd into the river Usk, at or near a certain collateral canal from the same, all in the mouth; and for making and maintaining railways or such canals to several iron-works and mines in the mouth and Brecknock.

3, an act passed for extending the Monmouthshire, and for explaining and amending the above act.

3, an act passed for making and maintaining certain communicate with the Monmouthshire Canal Navigation, the Company of Proprietors of that navigation to sum of money to complete their undertaking, and for amending the above acts.

said three acts of parliament, which are declared to accompany this case, with leave to either side to ret thereof (a).

c. 102. Some of material to be here is act will be found in the case of *Rex v. the Canal Company*. It is provided "that if the estate, &c. &c. situate from any part of or railways, should consent that any railway made through the river person, for the carrying his iron, coal, the said canal or the said Company should make any such case the owner, as, might make any and that such railway for the conveyance, &c. on payment, at whose expense was made, such

tolls as for the time being should be payable to the said Company."

42 Geo. 3, c. 115. By sect. 1 of this act, certain persons were incorporated by the name of the Sirhowy Tram-road Company, and were empowered to make a railway or tram-road from Sirhowy furnaces or iron-works, in the parish of Bedwelty, Monmouthshire, along by Tredegar iron-works, then erecting in the same parish, down to a certain point called *Nine-mile Point*; and for this purpose to have, use, exercise, and enjoy such and the like ways, passages, powers, and authorities, upon, in, and over the lands through which such railway or tram-road should be made, in as full, ample, and beneficial a manner, to all intents and purposes, as the Monmouthshire Canal Navigation Company were authorized and em-

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The tram-road authorized to be made by the last of these completed some years since according to the directions of the act and is commonly termed the Sirhowy Tram-road. The

powered to have, use, &c. under and by virtue of 32 Geo. 3, c. 102, with respect to the canals, railways, and other works thereby authorized to be made. Sect. 2 authorized and empowered the Monmouthshire Canal Navigation Company to make and maintain a railway or tram-road from the point called the *Nine-mile Point*, down to, (with the exception of one mile of the road passing through Tredegar Park, which was to be made by Sir C. M. the owner, at his own expense on certain terms) and so as to communicate with, the Monmouthshire Canal Navigation and the river Usk at or near Newport, and also certain other branch railways. Section 3 enacts "that the said Sirhowy Tram-road Company, and the Monmouthshire Canal Navigation Company, and their respective agents, &c. and all bodies politic, &c. and all other persons whomsoever, shall have and be seised and possessed of, and are hereby respectively invested with such and the like estates, authorities, powers, abilities, interests, privileges, and advantages, and shall be, and are hereby made subject and liable to, such and the like rules, conditions, directions, regulations, limitations, restrictions, payments, penalties, forfeitures, punishments, and benefit of appeal, with respect to the said railways or tram-roads, and other works hereby authorized to be made and maintained by the said Sirhowy Tram-road Company, and by the Monmouthshire Canal Navigation Company respec-

tively as aforesaid, and to chase and sale of lands hereditaments, and the sale of lands &c. to the said Company respectively, for the purposes said, and to all other matters in anywise relating as are mentioned, given, prescribed, established, and in and by the said first act, (i.e. 32 G. 3, c. 1) in respect to the said canals, and other works thereby authorized to be made and carried out for intents and purposes whatsoever as the same respectively shall be applicable, and repealed, altered, re-enacted or otherwise provided for, in any present act; and that the said Sirhowy Tram-road Company, Monmouthshire Canal Navigation Company respectively, shall not demand, take, and receive, and the like rates, tolls, or for the tonnage of iron, coal, stone, and other commodities and conveyed on the said railways or tram-roads hereby authorized to be made by them respectively the Monmouthshire Canal Navigation Company are by the said mentioned act authorized and empowered to demand, take, receive, for the tonnage and of the like articles, carried or conveyed on the said canals or railways thereby authorized to be made and except as here otherwise provided and in The remainder of the clause set out above, p. 165, in notice

am-road no where communicates, or forms a junction, with the rails or tram-roads made under the powers of the act of 32 Geo. 3. *John Jones*, esq. was, at the time of making the application and quest hereinafter mentioned, and still is the owner of certain lands called Tir Lewis David, containing unopened coal mines. These are situate within much less than eight miles of part of that proportion of the Sirhowy Tram-road which is below the nine-mile point mentioned in the act 42 Geo. 3, and therefore within much less than eight miles from that point; and they are also situate within much less than eight miles of every part of that proportion of the Sirhowy Tram-road which is above the nine-mile point. The part of that proportion of the Sirhowy Tram-road above the nine-mile point, nearest to the lands of *John Jones*, is not more than half a mile distant from the said lands, and the distances between the lands of *John Jones* and the Sirhowy Tram-road, in several other parts of that proportion of the said tram-road which is above the nine-mile point, are not more than two miles, two miles and a half, and three miles. The same lands of the said *John Jones* are within eight miles of the main canal made by virtue and in pursuance of the first section of 32 Geo. 3. The said *John Jones* deeming it expedient that a railway or waggon-road should be made from his lands, for the purpose of conveying the coals in his lands to a part of the Sirhowy Tram-road, which is immediately below the nine-mile point, over, through, and along the lands of several other persons, owners of land situate between his lands and the said nine-mile point, and who refused to consent to the making of the said railway or waggon-road; and being advised that the provisions of the 128th section of the said act of the 32 Geo. 3, were to be considered as incorporated into the act of the 42 Geo. 3, so as to authorize the making of such railway or waggon-road from his lands to any part of the said Sirhowy-Tramroad, within eight miles of his lands, made an application and request in writing to the Company of Proprietors of the Monmouthshire Canal Navigation to make such railway or waggon-road, at a general meeting or assembly, held as is mentioned in and directed by the 76th section of the said act of 32 Geo. 3, such application and request specifying all matters required by the said section to be specified in such applications and requests.

The said Company of Proprietors refused, for the space of three calendar months after such application and request had been made, to make any such railways or waggon-roads.

The said *John Jones* made no application or request of any kind or in any manner to the Sirhowy Tram-road Company to make such railway or waggon-road.

The length of the railway or waggon-road so proposed to be made by the said *John Jones* is more than four but less in the whole

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than five miles. Its proposed junction with the Sirhowy Tram is below the nine-mile point, and in that proportion of the Sir Tram-road which was made by the Company of Proprietors of Monmouthshire Canal Navigation. The said railway or waggon would not pass over, through, or along, or damage or interfere with any house or building, or any ground which was the site of any house or building, or any garden, orchard, yard, park, paddock, planted walk, avenue, lawn, or pleasure ground (a). No railway or waggon-road could be made from the lands of *John Jones* to that part of the Sirhowy Tram-road which is the nearest to the lands, and which, as is above stated, is not more than half a mile distant therefrom, for the purpose of conveying coals from the mines to such part, but at an expense which would prevent the working of the said mines at a profit; but a railway or waggon-road might be made from *John Jones's* lands to several or some of that proportion of the Sirhowy Tram-road which is above the nine-mile point without any such expense as would prevent the working of the mines in his lands at a fair and reasonable profit, although the same would not be wrought to so large a profit as they would yield if the proposed longer railway or waggon-road were made a railway or waggon-road, if so made as is last mentioned, to connect parts of that proportion of the Sirhowy Tram-road which is above the nine-mile point, would pass through the lands of several owners of land against their consent, but would not pass through the lands of several other owners of lands against whose consent a railway or waggon-road from the lands of the said *John Jones* to a point of junction below the nine-mile point must pass.

If a railway or waggon-road is made from the lands of Mr. Jones to a point of junction below the nine-mile point, the Sirhowy Tram-road Company would not be entitled to any tolls for coals carried from Mr. Jones's mines along part of the Sirhowy Tram-road. If a railway or waggon-road is made from the lands of Mr. Jones to a point of junction with the Sirhowy Tram-road, above the nine-mile point, the Sirhowy Tram-road Company would be entitled to some tolls for coals carried from Mr. Jones's mines along part of the Sirhowy Tram-road.

The questions for the opinion of the Court are, whether the provisions of the 128th section of 32 Geo. 3, are, by the force and effect of any clause, enactment, or words in 42 Geo. 3, to be considered as so incorporated into and made part of the provision in the 42 Geo. 3, as that the whole or any and what part or parts of the Sirhowy Tram-road is or are to be taken and considered as

(a) Which, except in certain cases specified in the schedule, was prohibited by sect. 4 of 42 Geo. 3, c. 115.

which the said provisions are applicable, so as to authorize the making of such railways or waggon-roads to the said Sirhowy 1, or such part or parts thereof, from any lands within eight miles of, as are authorized to be made by the said 128th section, the railways mentioned in the act of the 32 Geo. 3, from any lands situate within eight miles of such last-mentioned railways? The judges of this Court shall be of opinion in the affirmative, that whether, if any railway is intended to be made to the Sirhowy Tram-road under the effect of the said provision so under-considered, and to be made against the consent of the owners of the land through which it is proposed the same should be made in the said 128th section, ought or ought not to be pre-judged both to the Monmouthshire Canal Company and the Sirhowy Tram-road Company, or to either and which of them,—it is proposed that an intended railway shall join the Sirhowy Tram-road above the nine-mile point, or below the nine-mile point, and if such application or request ought to be made to them in what manner the same is to be made, there being no meeting of both Companies; and in what manner an application or request ought to be made to the said Sirhowy Tram-road Company, if a request or application to that Company is necessary? whether, according to the true interpretation of the said Monmouthshire Canal Company, upon request and application made to them only according to the 128th section aforesaid, their refusal, the said *John Jones*, would by law be entitled to a railway or waggon-road from the said lands of the said *Jones* without the consent of the owners of the land through which the same must pass, to a point of junction with the Sirhowy Tram-road, below the nine-mile point, which is distant more than four miles from *John Jones's* lands, or to any point of junction above the nine-mile point more distant than three miles from the said lands of the said *John Jones*, taking it as a fact that the mines of the said *Jones* could be wrought at a fair and reasonable profit to the said *Jones*, if the coals were carried from such mines to a point of junction with the said tram-road, not more than two miles from his lands, though the same could not be wrought to so large a profit as if the coals were carried to a point of junction below the nine-mile point, or to a point of junction above the nine-mile point, but more distant than three miles from the said lands than three miles; and taking it also as a fact that a railway or waggon-road made to join the Sirhowy Tram-road below the nine-mile point, or to join it above the nine-mile point, but when the junction was more than three miles from the said lands of the said *John Jones*, would be made with a more ex-

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pedient degree and variation of descent than a railway or waggon-road would be made with a point of junction not more than two miles from the said lands; such difference of descent, nevertheless, not preventing a fair and reasonable profit arising from working of the coal mines?

*Judges' Certificate.*

"This case has been argued before us by counsel, and we are of opinion the provisions of the 128th section of the 32 Geo. 3, are *not*, by force and effect of any clause, enactment, or words in the act of the 42 Geo. 3, to be considered as so incorporated into and made part of the provisions of the act of the 42 Geo. 3, as that the whole or any parts of the Sirhowy Tram-road is to be considered a railway to which the said provisions are applicable, so as to authorize making of such railways or waggon-roads to the said Sirhowy Tram-road, or any part thereof, from any lands within eight miles thereof, as are authorized to be made by the said 128th section to any of the railways mentioned in the said act of the 32 Geo. 3, from any lands situate within eight miles of such last-mentioned railways:—*unless the lands from which such railways are to be made to the Sirhowy Tram-road are within eight miles from some part of the canals, or of the railways, particularly described in the 32 Geo. 3, so as to warrant making a railway therefrom under the 32 Geo. 3.*

J. BAYLEY,  
 G. S. HOLROYD,  
 W. D. BEST."

The Lord Chancellor Eldon subsequently made the following observations, which were handed with the certificate to Mr. J. Bayley, who made the reply thereto which is subjoined.

*Lord Chancellor's Remarks.*

"This matter has come again before me, Mr. Puller and Mr. Campbell attending with the Chancery counsel. On neither side are they able to state what is meant by the words in italics. If they except any railways to be made to the Sirhowy Tram-road out of the negative answer contained previously in the certificate, then as to such railways, the other questions in the case stated, which have not been answered, should receive an answer from the judges, but are not noticed in the certificate at all."

"If the words in italics do not import that some railways are such as do not fall within the preceding negative answer, what is the exact meaning of those words?"

*Mr. Justice Bayley's Answer.*

ear Lord,—The judges before whom the case of the Sirhowy Tram-road was argued, were of opinion that the Sirhowy Tram-road, not, under 42 Geo. 3, made a new terminus, so as to warrant upon all lands within eight miles thereof; and that the 42 Geo. 3, gave no right to make a railway to the Sirhowy Tram-road, which before that act were not liable to that burthen. There might be lands within eight miles of the termini specified in 42 Geo. 3, (viz. the canals and the railways specially debarred by that act,) and railways over those lands to those termini, which upon or fall in with the Sirhowy Tram-road, the qualification at the end of our certificate was intended to intimate that such railways, independently of 42 Geo. 3, could have been made under that act, might still be made. I have the honour to be, &c.

J. BAYLEY.

April, 1823.

If this explanation be insufficient I will readily attend your summons when and where you may appoint, and so will either of my

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## NG v. The Justices of the Borough of STAFFORD.


A local act of 11 Geo. 4, sess. 1830, for paving the streets &c. within the borough of Stafford, the mayor, aldermen, and capital burgesses, of the borough, and justices, tenants, or occupiers, of any hereditaments within the borough, of the yearly value of 25*l.*, were appointed commissioners for putting the several powers of the act into execution; and for that purpose were

empowered by the rate, an appeal was given to the commissioners, and from their decision to the sessions; and it was enacted, that in case any person refused to pay his rate for seven days after demand, it should be lawful for the collector, upon proof on oath of such demand and non-payment, by warrant to the collector to levy the rate by distress and sale of the goods of the person named in case there should be no distress, to commit the party to gaol:—Held, that the clause was not obligatory on the justice to issue a warrant, *without a summons*.

It was held, that in all cases in which magistrates are authorized, upon application, to issue a distress-warrant for non-payment of any rate, although they have no power to relieve, it is their duty first to call the party before them by summons;—By an act of parliament it be specially directed that the warrant shall be issued only if the party be summoned.

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empowered to make rates and to appoint assessors collectors of the rates. The assessors were to asce the yearly value of the premises to be rated, and several sums which ought to be charged upon tenants, occupiers, or landlords. The commissi were empowered to remit or reduce the rates, e on account of poverty, or on the ground that the ter or owners of the premises received no or only a p benefit by reason of the act. It was also provided, if any person thought himself aggrieved by any rat might apply to the commissioners, after the deman of the rate, and the commissioners were empowere give such relief as to them should seem reasonable; if any person thought himself aggrieved by their d mination, he might appeal to the quarter sessions; it was enacted, that in case any person who shoul rated or assessed, or subject or liable to the paymen any rate to be made as aforesaid, should refuse or lect to pay his proportion of any of the said rates any collector or collectors to be appointed as afore: for the space of seven days next after personal den thereof made, or demand thereof in writing left at usual or last place of abode of such person, it shoul *lawful* for any justice or justices of the peace of said borough, upon proof made upon oath of demand and non-payment, (which oath any such ju or justices were thereby *empowered and required* administer,) by warrant under the hand and sea hands and seals of such justice or justices, (which and they were thereby *empowered* to grant,) to authc and direct the said collector or collectors to levy rate or moneys so in arrear, together with the costs charges attending the same, to be ascertained by justice or justices, by distress and sale of the go and chattels of the person so refusing or neglectin

ly as aforesaid, rendering the overplus (if any) upon demand, to the owner; and in default of distress, such justice or justices were authorized to commit such person to gaol, for any period not exceeding three months, or until payment of such sum as should have been found due and in arrear upon any such assessment, together with all costs &c., to be ascertained by the said justice or justices. It was also enacted, that all *finés, penalties, and forfeitures*, imposed by the act, in the manner of levying and recovering whereof was not particularly directed,) should be recovered by distress and sale of the goods of the offender, by warrant of any justice of the borough, upon the confession of the party, or upon the information of any credible witness upon oath; and in case there were no goods, the offender was to be committed to gaol. It was further provided, that in all cases in which by the act any *penalty or forfeiture* was imposed, and made recoverable by information before a justice of the peace, it should be lawful for any justice of the peace to *summon* the party complained against, and on such summons to determine the matter of such complaint, although no information in writing should have been exhibited. It was further enacted, that when any distress should be made for any sum of money to be levied by virtue of the act, the distress itself should not be deemed unlawful, nor the parties making the same be deemed trespassers, on account of any defect or want of form in the *summons*, conviction, warrant of distress, or other proceeding relating thereto."

Two rates were made under this act, on the 6th August, 1833, and 25th August, 1834, respectively. An information upon oath in writing was made by Jones, one of the collectors, that J. W., an occupier of a house and premises in the borough, was duly assessed by those

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two rates, towards the necessary expenses and purposes of the act, in the sum of 6*l.* 17*s.* 6*d.*, and that such sum had been lawfully demanded of *J. W.*, who had neglected to pay the same for the space of seven days next after such demand being made. The information in conclusion prayed that a distress warrant might be forthwith issued, to levy the said sum upon the goods and chattels of the said *J. W.* The justices refused to issue a distress warrant, without *previously issuing a summons* to the party of whom complaint was made.

Upon an affidavit of these facts, a rule nisi was obtained for a mandamus to the justices to issue their warrant for levying, upon the goods and chattels of *J. W.*, the sum of 6*l.* 17*s.* 6*d.*

*Whateley* now shewed cause. The question for the consideration of the Court is, whether the justices are to be *compelled* to issue a distress warrant for the enforcement of the payment of these rates, without previously *summoning* the parties to appear and state what they may have to urge why their goods should not be distrained. The clause upon which reliance is placed, is that which enacts that in case the rate shall be unpaid for seven days after demand, it shall be *lawful* for any justice, *by warrant*, to authorize the collector to levy the rate. Although no mention is here made of a summons, yet the justices are not therefore bound to grant their warrant at once, without summoning the party. By a subsequent clause in the act, it is enacted, that where any distress is made, the distress shall not be deemed unlawful "on account of any defect or want of form in the *summons*, conviction, warrant of distress, or other proceeding relating thereunto." This shews that the legislature presumed that a summons would be issued previously to the making of a distress. Lord

*Kenyon*, in *Rex v. Benn* (a), says, "It is an invariable maxim of our law, that no man shall be punished before he has had an opportunity of being heard;" whereas if a distress warrant were to issue without a *previous summons*, the party would have no opportunity of shewing cause why the execution should not issue against him. There are several cases in which it has been held, that for justices to proceed against a party without summoning him, is a *misdemeanor*, for which they are liable to a criminal information; *Rex v. Venables* (b), *Rex v. Constable* (c), *Rex v. Broderip* (d), *Rex v. Commins* (e); and it is well established that this Court will not, by mandamus, compel magistrates to do that which will expose them to an action; *Rex v. Justices of Bucks* (f), *Rex v. Justices of Bucks* (g).

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*R. V. Richards*, who was to have supported the rule, was absent.

LORD DENMAN, C. J.—These magistrates have, in my opinion, done that which is perfectly correct. Supposing them to have the *power* to issue a warrant in the first instance, they have done right in thus limiting its exercise. If the party against whose goods the distress warrant is prayed, be summoned, he may shew that he has paid his proportion of the rate to one of the collectors who has not accounted for it.

LITLEDALE, J.—We ought not to issue a mandamus to *compel* magistrates to issue a distress warrant, without having previously issued a summons.

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| (a) 6 T. R. 198.             | S. C. 5 Barn. & Cressw. 239. |
| (b) 2 Lord Raym. 1407; S. C. | (e) 8 Dowl. & Ryl. 344.      |
| 1 Str. 630.                  | (f) 2 Dowl. & Ryl. 689;      |
| (c) 7 Dowl. & Ryl. 663.      | S. C. 1 Barn. & Cressw. 485. |
| (d) 7 Dowl. & Ryl. 361;      | (g) <i>Ante</i> , ii. 37.    |

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PATTESON, J.—I am of the same opinion. The only question is, whether the clause which empowers the magistrates to issue a distress warrant, in case of non-payment of the rate, is *obligatory*. The language of the clause is, that "*it shall be lawful*" for the justices to issue a warrant of distress. There may be cases in which a summons would only be notice to the party summoned to get out of the way, and the magistrates may, in order to meet such a case, have a *power* to issue a distress warrant in the first instance, but they are not to be compelled to do so by *mandamus*.

WILLIAMS, J.—The magistrates have exercised a proper discretion, and this rule ought therefore to be discharged.


*R. V. Richards* was subsequently heard in support of the rule. By the act, certain commissioners are empowered from time to time to make rates, and are authorized to relieve parties who either receive none, or only a partial benefit from the act, or who are unable, from poverty, to pay the rate. The magistrates have no discretion to exercise as to issuing warrants, when applied for by the proper parties. Their duty, under the clause which has been referred to, is entirely ministerial. But another clause has been referred to as shewing that the legislature contemplated that a summons would be issued. That, however, is explained by a reference to the clause respecting the mode of proceeding in all cases in which any *penalty or forfeiture* is imposed, in which it is provided that the justices may *summon* the defendant, although there is no information in writing. Where the magistrates have no discretion, they ought not to issue a summons. It would be a mere notice to the party complained of to get out of the way.

[Lord *Denman*, C. J. The words of the act are, that "it shall be *lawful*" for the justices to issue a distress warrant.] This case bears no resemblance to those in which the magistrates have a power to hear and determine the matter in dispute. [*Patteson*, J. How does this differ from the case of a *poor-rate*, which the justices have no power to modify? The 4th section of the 43 *Eliz.* c. 2, is analogous to the clause in this act, and it has been held, that before the magistrates issue a distress warrant for a *poor-rate*, they should summon the party.] Here, the commissioners are the persons to redress all grievances. [*Patteson*, J. In the case of a *poor-rate*, the appeal is to the quarter sessions.] The magistrates have a discretion in the case of a *poor-rate*. [*Patteson*, J. Not by the words of the act.] The justices in this case have no power to relieve. For what purpose, therefore, is the summons to be issued? [*Patteson*, J. The party may shew that the rate has not been demanded, or that he has paid it and that it has not been accounted for.] At all events the Court will discharge the rule without costs, as the question was doubtful.

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LORD DENMAN, C. J.—Not the slightest doubt has been raised in my mind by the argument which has just been urged. The argument with respect to the occurrence of the word "summons" in that clause which provides that no distress shall be unlawful for any defects of form, has certainly been answered, but it is impossible to distinguish this act from the 43 *Eliz.* c. 2. By that act the rates are to be made by the churchwardens and overseers, and when made, the magistrates are to enforce the payment *by warrant*. The same language is held in this act. The magistrates should issue a summons, not by way of exercising any

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authority over the rate, but, admitting the rate to be valid, to call on the party to shew cause why his proportion of it is unpaid. The appeal against a poor-rate is to the sessions; that against *this* rate is to the commissioners. Why are we not to suppose that the legislature, who passed this local act almost in the same form as the 43 *Eliz.*, intended that the mode of proceeding under both should be the same? Supposing that the magistrates had the *power* to issue the warrant in the manner prayed, yet they were perfectly justified in refusing to issue it without having summoned the party. The magistrates have, in my opinion, done themselves honour by limiting their jurisdiction. It is a matter of course that magistrates have their costs. If these persons had been less impatient, they might have had no difficulty.

LITLEDAL, J.—I continue of the same opinion, except as to the argument upon the occurrence of the word “summons” in the clause providing against defects of form. I cannot distinguish this act from the 43 *Eliz. c. 2.* It is reasonable that the magistrates should call the party before them, to ascertain whether there has been any refusal to pay. That is not saying that the magistrates are to exercise any discretion as to the rate.

PATTESON, J.—It is plain that the magistrates have only power to enforce the payment of *the rate*; but the words of the act are not compulsory on them to issue a warrant upon the information of the collector. They have, in my opinion, exercised the power entrusted to them most properly and discreetly.

WILLIAMS, J.—My mind remains in the same state.

I do not entertain any doubt on the question. Neither the language of the particular clause, nor general duty, obliges the magistrates to issue a warrant in the first instance. The simple expression in the act is, that "*it shall be lawful*" for the justices to issue a warrant of distress. The analogy between this and a poor-rate is perfect and complete. *Rex v. Benn* shews that it is an answer to an application for a mandamus to justices, to command them to grant warrants of distress for non-payment of poor-rates, that no previous summons had been issued. The magistrates in this case have, in my opinion, acted *legally and wisely*.

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Rule discharged with costs.

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*CAMPBELL*, A. G. applied for a rule nisi for a criminal information against an overseer, at the instance of the vestry of the parish, the name of which he suppressed, under the following circumstances. The small-pox having broken out in this parish, it was resolved by the vestry, in order to stop the progress of the disorder, that the poor should be vaccinated, and in that resolution the overseer concurred. To carry the resolution into effect, a medical man was employed to vaccinate the poor at the rate of 1s. 6d. each, with which arrangement also the overseer expressed himself to be perfectly satisfied. The surgeon came to the parish for that purpose, but the overseer refused to allow him to vaccinate any of the poor on the parish account. After this the

An overseer is not bound to take precautionary measures against the small-pox by causing the poor to be vaccinated. And even if the overseer has, by the direction of the vestry, agreed that the poor shall be vaccinated at the expense of the parish, and refuses to fulfil that agreement, the Court will not grant a criminal information against him; although, in consequence of his conduct, the infection of the small-pox has spread and many of the poor have died.

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infection spread, and a large proportion of the poor in the parish had the disorder. The resolution to vaccinate the poor took place when only one boy was ill of the disorder; since then many had died of it, and several others had suffered very severely.

*Campbell, A. G.*, in support of the motion. The duty of an overseer is to relieve the poor, and if the overseer does not furnish them with relief, he is liable to be called on to answer for his neglect of duty. There can be no doubt that it was the imperative duty of the overseer to provide against this malady. It is a disease which, if taken in its natural form, and allowed to spread, is attended with the most dreadful consequences, but which may be guarded against by inoculation or vaccination. The overseer was fully aware of the probable consequences of this dreadful malady. If he had allowed a reasonable sum to vaccinate the poor, these unfortunate circumstances would not have happened. It was a gross breach of his duty. If the poor are neglected in this way, complaints may naturally be expected from them, but they will not complain if they find that those in whose hands the constitution has placed the means of affording them relief and protection, exercise that power to provide for their wants and necessities.

Lord DENMAN, C. J.—These circumstances are extremely unfortunate. No doubt the overseer exercised a very unsound discretion. If he had abided by the opinion he had originally formed, and the agreement he had made, these consequences might have been prevented. But, before we can grant a rule nisi for a criminal information against a public officer, we must see plainly and clearly that the *duty* which he is charged with neglecting is by law cast upon him. It is true,

that by law an overseer must provide *necessaries* and *relief* for the poor, but is he bound to take *precautionary measures* of this kind? It is beyond question that, if he had provided them, the poor would not have been bound to *submit* to any operations of this sort. If the *legal duty* of the overseer had been clear, the unfortunate consequences which have followed the omission of the performance of that duty would have shewn a case of gross neglect, which would have called for the exercise of the power of this Court: But the first step in the case is not made out to my satisfaction, and I am therefore of opinion that the rule must be refused.

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LITLEDALE, J.—The office of overseer is a statutory office, and the duties of an overseer are pointed out by act of parliament. There is no statute which casts on an overseer this duty, and it does not arise out of the nature of his employment. If it did we might interfere. The poor might refuse to run the risk of any operation.

PATTESON, J. and WILLIAMS, J. concurred.

Rule refused.



The KING v. The Archdeacon of LITCHFIELD and  
 COVENTRY.

*M. D. HILL* applied for a mandamus, to be directed to Archdeacon *Spooner*, commanding him to swear in Mr. *Gutheridge*, who had been elected to the office of churchwarden of the parish of St. Martin, Birmingham.

A rule for a mandamus to the archdeacon to administer the oath of office to a churchwarden, is absolute in the first instance, where there is no rival candidate, and no reason assigned for the refusal to administer the oath.

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*Gutheridge* had been duly elected, and had attended at the proper time and place to be sworn in, when the Archdeacon refused to administer the oath. [Lord *Denman*, C. J. Is there any rival candidate?] It does not appear that there is, nor is it stated that any reason was given for the refusal. If there was a rival candidate, it was the duty of the Archdeacon to swear-in both parties, that the right might be contested elsewhere. [Lord *Denman*, C. J. What was the ground of refusal?] It is not known.

The COURT granted the rule absolute in the first instance.

### The KING v. The JUSTICES of MIDDLESEX.

The Court will not grant a mandamus to justices of Middlesex, commanding them to issue distress-warrants for levying paving rates made in any district within the metropolis, but will leave the commissioners, (or other persons having the control of the pavements of the district,) to their remedy by action

under 57 *Geo. 3*, c. xxix, s. 38.

The 57 *Geo. 3*, c. xxix, s. 38, applies as well to those districts within the metropolis, the paving commissioners of which have already, by a local act, a *limited* power of bringing actions for the recovery of rates, as to other districts.

saying, that they entertained doubts as to the legality of the rate, and thought that if they issued the warrants, actions of trespass would be brought against them. The circumstances connected with the election of the commissioners were also stated upon the affidavits.

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*Campbell, A. G. and Platt*, in shewing cause, denied the validity of the rate, and contended further, that, assuming the rate to be good, a mandamus would not lie, as both by a local act of 23 *Geo. 3*, c. 90 (*a*), and the act of 57 *Geo. 3*, c. xxix. (*b*), (*Michael Angelo Taylor's act*),

(*a*) Intituled "An Act for better paving, cleansing, and lighting the Parish of St. Martin-in-the-Fields, within the Liberty of Westminster, and certain Places adjoining thereto; and for removing and preventing Nuisances and Annoyances therein." By this act a power to pave, &c. the parish, is given to the vestry and a committee of the inhabitants; the committee, and, in case of default, the vestry, are authorized to make rates; which rates the collectors are, in case of refusal to pay them, authorized to collect and levy, by warrant under the hands and seals of two justices of Middlesex, and by distress and sale; and, by section 33, the commissioners are authorized, if they think fit, *where no sufficient distress can be made*, to direct and cause an action to be brought in any of his majesty's Courts of record at Westminster, for the recovery of any of the said rates; and upon proof of the demand made, and refusal or

neglect of payment of the rate for the recovery whereof such action shall be brought, the commissioners shall be entitled to a verdict.

(*b*) Intituled "An Act for better paving, improving, and regulating the Streets of the Metropolis, and removing and preventing Nuisances and Obstructions therein." By section 38, the commissioners or trustees, or other persons having the control of the pavements of any parochial or other district within the jurisdiction of that act, are authorized at any time thereafter (if they shall think it expedient), in the name of their treasurer, clerk, or collector, to bring or cause to be brought any action of debt, on the case, or other action, in any of his majesty's Courts of record at Westminster, or to proceed in any Court of Requests, or other Court whatever (for the recovery of debts above or under five pounds), within the jurisdiction of which the messuages or here-

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power is given to the commissioners to bring actions at law for the recovery of those rates.

Sir W. W. Follett and Channell, *contra*, contended that the rate was good, and that no action was maintainable for these rates, or, if maintainable, that it was not an efficient remedy; that under the local act an action was given only where *no sufficient distress could be found*, which was not shewn to be the case here; and that the more general act could not be considered as applying to districts where, by a local act, a restricted power of bringing actions had already been given.

ditaments in respect whereof such rate shall be made, or wherein the person or persons, or either of them, against whom such action or other proceedings may be brought, shall reside,—against executors, assignees, sheriffs, &c., or any other person or persons liable to pay money by virtue of any rate for the expenses of paving, &c. the streets, &c. in any such district, by virtue of any local act, or by virtue of this act, for the recovery of the money due from any such person or persons dying or becoming bankrupt, or whose effects may be taken in execution or otherwise, or from any other person or persons liable to pay the same: and that in any such action or other proceedings it shall be sufficient for the plaintiff or complainant to declare or allege, that the person or persons against whom such action, &c. may be brought, is indebted to him in


such sum as shall appear to be due by or on account of any such rate; and that it shall only be necessary for such plaintiff, &c. to produce any such rate, and to prove that the person or persons against whom such action, &c. shall be brought, or who shall be deceased, or have become bankrupt, or whose effects have been taken in execution or otherwise, was or were the person or persons mentioned in such rate, or liable to the payment thereof by virtue of any local act, or of this act, to entitle such plaintiff, &c. to recover the whole sum for the recovery whereof such action &c. shall be brought; and that if such plaintiff &c. shall recover the whole or any part of the sum claimed, he shall have full costs; and that in any such action no essoin, protection, or wager of law, nor more than one imparlance shall be allowed.

LORD DENMAN, C. J.—It seems to me that this rule ought to be discharged, on this strict and simple ground, that there is another, and, I think, a preferable and more speedy remedy. The 38th section of *Michael Angelo Taylor's* act (57 Geo. 3, c. xxix.) seems to be framed expressly with a view to prevent this circuitous proceeding by way of mandamus; in which the party seeking to enforce the rate first comes here to apply for the mandamus; which being granted and issued, distress-warrants are made out by the justices; then the distress takes place; and finally an action is brought against the magistrates, in which the very same questions may be raised and decided as in an action brought at once against the party on whom the rate is made. On this short ground alone, I think that this rule must be discharged.

LITTLEDALE, J.—I entirely concur. It is suggested that the mandamus would be preferable, because then all the money might be raised *at once*. Certainly, there might be four or five hundred distress-warrants issued *at once*, but then there might be as many actions brought against the magistrates. The question may be as well tried by an action against the party rated. It is true that the action will not lie on the local act, because that act gives the action only when *no sufficient distress* can be found:—But there is no such limitation in 57 Geo. 3, c. xxix; and upon that statute the action may be brought. I give no opinion upon the other questions.

PATTESON, J.—I entirely agree that the rule ought to be discharged. The 38th section of 57 Geo. 3, c. xxix., enables the commissioners or trustees, or other persons having the control of the pavements of any parochial or other district within the metropolis, to bring actions in any of the superior Courts at Westminster, or

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to institute proceedings in any Court of Requests in certain cases, for the recovery of any sum of money due from a person liable to pay the same, for or in respect of any rate made for the repair of the pavement, &c. of the streets in such district. This act was passed subsequently to 23 *Geo. 3*; and I think that the argument that this provision does not apply to a case where a limited power of bringing actions was previously possessed, is wrong. I think that it operates to *enlarge* the power.

WILLIAMS, J.—I entirely concur. It has long been a rule that this Court will not grant a mandamus to magistrates, commanding them to do a thing which may involve them in an action, especially where another remedy is open to the party applying. I agree that the 38th section of 57 *Geo. 3*, authorizes the bringing of an action in all cases, without restriction. In that action all proper questions are open to the parties. We ought not, if we can avoid it, to put *magistrates* in the place of the parties to try the action.

On the other points it is unnecessary, and perhaps would be improper, to give any opinion.

Rule discharged.

—◆—

The KING v. SIVITER.

A charter,  
 granted by  
 Queen *Eliz.*  
 and confirmed  
 by *Charles 1*,  
 exempting the  
 tenants of cer-

UPON an appeal against a conviction of *Samuel Siviter* for neglecting to perform statute duty on the highways in the parish of Kingswinford, pursuant to the 13 *Geo. 3*, 34 *Geo. 3*, 44 *Geo. 3*, and 54 *Geo. 3*, the court of quarter

tain ancient demesne lands from the payment of road money (*chimagium*), does not operate to exempt them from the performance of *statute duty* on the highways, pursuant to 13 *Geo. 3*, c. 78, 34 *Geo. 3*, c. 64, 44 *Geo. 3*, c. 54, and 54 *Geo. 3*, c. 109.

essions affirmed the conviction, subject to the opinion of this Court upon a case, which stated in substance as follows:—The appellant claimed to be exempt from the performance of statute duty on the highways, on the ground that he was occupier of ancient demesne lands in Kingswinford, and that, by charter, the tenants of demesne lands in that parish were exempted from the payment of all highway rates. The charter was granted by Queen *Elizabeth*, in the ninth year of her reign, and was confirmed by *Charles* I, in the fifth year of his reign. The material words in the charter of *Charles* were, as translated, thus: "We do authorize and command you that you suffer all and singular the men and tenants of the parishes of Kingswinford and Clent, and every of them, to be quit of all payments of toll, slate-money, highway-rate, bridge-money, pitching-money, walking-money, standing-money, and from the expenses of knights." The word in the original, which has been translated as "*highway rate*," was "*chimagium*."

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*Corbett*, who appeared to argue in support of the order of sessions, was stopped by the Court.

*Godson*, contra, contended that the performance of the statute duty was within the meaning of the exemption of the charter, and read the opinion of a learned gentleman to that effect.

*Corbett* referred the Court to the case of *Brett v. Whitcomb* (a).

LORD DENMAN, C.J.—If a statute enacts that certain persons shall either perform certain specified duties, or,

(a) 3 Mod. 96.

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in lieu thereof, pay certain penalties, I do not see how such persons can be excused from the performance of those duties, or from the payment of those penalties, because they were exempted, before the act passed, from the performance of the duties.

LITLEDALE, J., PATTESON, J., and WILLIAMS, J.,  
 concurred.

Order of Sessions confirmed.

—◆—

The KING v. The Inhabitants of ST. GEORGE,  
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Under 43  
*Eliz.*, c. 2, the  
 overseers of a  
 parish had  
 authority, with  
 the assent of  
 two justices,  
 to bind ap-  
 prentice a  
 child of pa-  
 rents legally  
 settled and  
 resident in  
 and charge-  
 able to such  
 parish, al-  
 though such  
 child be at the  
 time of execut-  
 ing the in-  
 denture resi-  
 dent else-  
 where, and  
 not a burthen  
 upon the pa-  
 rish.

BY an order of two justices of the peace for the city and county of the city of Exeter, *Mary Lee* and her five children were removed from the parish of St. George, in that city, to the parish of Crediton, in the county of Devon. Upon appeal, the Exeter quarter sessions<sup>(a)</sup> quashed the order, subject to the following case :

The settlement of the paupers depends upon that of *John Lee*, the deceased husband of *Mary Lee*.

*John Lee* was born in Crediton, of parents legally settled in that parish. When he was about twelve years old, an indenture, dated 15th October, 1811, was executed by the parish officers of Crediton, for the purpose of binding him apprentice to *William Mugford*, who was his uncle, and resided in the parish of St. George, Exeter. At the time of the execution of this indenture his father was at sea, and his mother, having other

(a) Mr. Justice *Coleridge* then sitting as Recorder of the city.


So, although  
 the binding  
 were to a

master resident out of, and unconnected with the parish, the master's consent having been expressed by his execution of the indentures.

children living with her in Crediton, was in the receipt of relief from that parish. *John Lee* himself was not residing with her, but had lived for a year or more with his uncle (*Mugford*), in the parish of St. George. The indenture was executed by the churchwardens and overseers of Crediton, at the pay-table of that parish, neither *Mugford* nor *Lee* being present, nor the magistrates who signed the allowance of the indenture. And it does not appear at what time or in what place they signed it, but it bears the signatures of two magistrates of the county of Devon. A counterpart was executed by *Mugford* at his house in Exeter, but *Lee* was not present when he executed it, and was not a party to it, nor to the original indenture. He continued to reside with *Mugford*, serving him in his business of a thatcher, till about a year after he attained the age of twenty-one years.

The question for the opinion of the Court is, whether this was such a binding of *John Lee*, as that the residence and service under it would confer a settlement, he having lived out of the parish of Crediton a full year before the indenture was executed.

*Barstow* and *Escott*, in support of the order of sessions. This binding took place before the passing of 36 Geo. 3, c. 139, and therefore the question as to the validity of the indenture depends upon 43 Eliz. c. 2. The simple point is, whether the mere fact of the poor child being corporally out of the parish at the time of the binding makes the indenture void. By the 6th section, the parish officers are authorized, with the assent of two justices, "to bind any such children as aforesaid to be apprentices where they shall see convenient." Upon reference to the first section it will be found, that by "such children as aforesaid" are intended "the

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children of all such whose parents shall not, by the said churchwardens and overseers, or the greater part of them, be thought able to keep or maintain them." There is nothing in the words of this act confining the power of the parish officers to the case of such children only as may happen, at the time of the intended binding, to be actually within the limits of the parish, so as to render necessary the ceremony of bringing the poor child into the parish at the time of the binding. In *Rex v. St. Nicholas, Nottingham (a)*, it was held, that if a poor boy be bound apprentice by the parish officers, with the consent of two justices, to a *master residing in a different parish*, and all the parties (except the apprentice) sign the indenture, the apprentice will gain a settlement in the parish of the master, by residing there forty days under the indenture. This case, and many observations in the judgments, afford a strong argument against the point principally contended for by the respondents; and at the same time the case is an express decision against them upon two other points, which, from the statements in the case, it appears to be intended to raise, namely, that the parish officers could not bind a poor child apprentice to a master residing out of the parish, and that the indenture required execution by the apprentice.

*Crowder* and *W. M. Praed*, *contra*. The indenture was void on two grounds: first, that *John Lee* was not a poor child whom the parish officers had any authority to bind; and secondly, that *Mugford* was not a person to whom they could bind a poor child apprentice.

I. It appears from the first section of 43 *Eliz. c. 2*, taken in connection with sect. 5, that parish officers were authorized to bind as apprentices such children only as they were also empowered to "*set to work*." By sect. 1,

(a) 2 T. R. 726.

the overseers are empowered to set to work the children of parents unable to maintain them; that is, such children as by reason of the inability of their parents to maintain them, are become *a burthen upon the parish*. If the child of poor parents resided out of the parish of his parents, the overseers of that parish had no power to bring him into the parish by compulsion, in order to set him to work. At the time of the passing of the act of 43 *Eliz.* there was no law of settlements, and the authority of parish officers extended only to such persons as were *in* their parish, and a burthen upon it. A poor child, who at that time resided away from his family in another parish, and became chargeable to it, could not be removed into the parish in which his family resided; therefore in no sense could he have been considered as a poor child of the latter parish, and a burthen upon it. Even to this day, overseers are, in strictness, not bound to relieve persons out of the parish, though settled there, unless in the case of a suspended order of removal,—where the liability arises out of a special enactment. It is true, that under 13 & 14 *Car. 2*, paupers settled in one parish may now be removed into it from another parish in which they may happen to be; but, though on the ground of expediency the practice is commonly otherwise, the overseers of the parish in which the pauper has a settlement is not bound to relieve until an order of removal has been made, and either executed or duly suspended. But, not only must the poor child be within the parish, in order to give the overseers power to set him to work or to bind him apprentice, he must also be the child of parents who are *unable to maintain* him. Now, though *John Lee's* mother was, at the time of the binding, in the receipt of relief from the parish of Crediton, yet as he himself was residing with his uncle in another parish, and maintained by him, it cannot pro-

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perly be said that his parents were unable to maintain him. [*Patteson, J.* If a person maintains his child by another,—as in this case, by an uncle,—there is an ability to maintain.] In order to support the proposition of the appellants, it is necessary to go the whole of this length,—that if a poor person in the receipt of relief in and from a parish in Devonshire, had a child living with a relation in Yorkshire, the overseers of the parish in Devonshire might, under 43 *Eliz.*, have compelled the child to come into their parish and be set to work. *Rex v. St. Nicholas, Nottingham*, has been cited as bearing upon this first point, but it does not appear to be an authority against it.

If the Court should be of opinion, for any of the reasons which have been urged, that the overseers had no authority to bind, under the circumstances of this case, the result will be, that the indenture must be held void, and not voidable only, and consequently no settlement will have been acquired by service and residence under it. The cases upon this point are, *Rex v. St. Nicholas, Ipswich (a)*, *Gray v. Cookson (b)*, *Gye v. Felton (c)*, *Rex v. Cromford (d)*, *Rex v. Ripon (e)*, *Rex v. Arnesby (f)*, *Rex v. Stoke Damarel (g)*.

II. Upon this point, the learned counsel admitted that *Rex v. St. Nicholas, Nottingham*, was an authority against them, but endeavoured to show that the matter required reconsideration. [*Coleridge, J.* It was my intention, when the case was before me at the Exeter sessions, not to allow this point to be raised by the special case. I thought it not right to re-agitate a question which had been decided many years ago, and which I knew would

(a) Burr. S. C. 91; 2 Str. 1066.

(b) 16 East, 13.

(c) 4 Taunt. 876.

(d) 8 East, 25.

(e) 9 East, 295.

(f) 3 Barnw. & Alders. 584.

(g) 1 Mann. & Ryl. 458; 7 Barnw. & Cressw. 563; 1 Mann. & Ryl. Mag. Ca. 155.

affect many settlements. I certainly intended expressly to refuse to reserve that point. *Patteson, J.* There is no doubt about *Rex v. St. Nicholas, Nottingham*. It is a sound and reasonable decision, which has been acted upon, and has never hitherto been questioned.]

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*Cur. adv. vult.*

The judgment of the Court was now delivered by

Lord DENMAN, C. J., who, after stating the facts of the case, proceeded as follows:—One point was made, which however was not intended to be reserved by the sessions, namely, whether, before the stat. 56 *Geo. 3*, c. 139, a child could legally be bound by the parish officers to a master not resident in their parish. We have no doubt on this point: It is expressly decided by *Rex v. St. Nicholas, Nottingham*, the authority of which case has never hitherto been questioned.

The point which was intended to be reserved was, whether the parish officers had power under 43 *Eliz. c. 2*, s. 5, to bind out any child not at the time resident in their parish. That section, by the word "*such*," refers to the first section of the same act, and the first section has these words, "the children of all such whose parents shall not, by the churchwardens and overseers, or the greater part of them, be thought able to keep or maintain their children." The words are not grammatically correct, but their meaning is obvious. At the time of the passing of the statute of 43 *Eliz. c. 2*, there was no law of settlement, nor could the children of paupers, if at a distance from their parents, be sent home by the parish officers. In that state of the law, the provisions of the 43 *Eliz. c. 2*, s. 5, could not apply to any children not actually resident in the binding parish. But since the law of settlement has been introduced, all

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the unemancipated children of a pauper are considered as part of his family ; and we think that the parish officers of any parish where the pauper is settled and residing, and unable to maintain his children, may bind out his child, with the assent of two justices and in the proper form, without the formality of having that child, if resident at a distance, brought home to his family. The case of *Rex v. Cole-Orton* (a), would at first sight seem to lay down the rule, that the statute of *Elizabeth* is to be construed without any reference to any subsequent statutes ; but on consideration we do not think that any such rule is there laid down : All that is decided is, that when a child is resident in a parish, and the parents are unable to maintain it, the parish officers may bind out the child, though the parents be not settled in the parish ; which is quite consistent with their having power to bind out one of a family legally settled and resident in, and chargeable to their parish, though the individual be at the moment resident elsewhere. As to the consent of the child, it is not requisite in the case of a parish apprenticeship ; and no danger need be apprehended that a child may be taken from a friend or relation, against the will of that friend or relation, and against the will of his parents, and bound to a stranger ; for the whole matter is under the superintendence of the justices, who cannot be supposed likely to sanction such an arbitrary proceeding.

Under these circumstances we are of opinion that the order of sessions must be confirmed.

Order of Sessions confirmed.

(a) 1 Barnw. & Adol. 25.



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G v. MATTHEW WILSON and JOHN NICHOLAS RHURST, Esqrs. Justices for the West Riding of Yorkshire.

JUSTICE, in last Michaelmas term, obtained a rule nisi for a mandamus to *M. Wilson* and *J. N. Coulthurst*, Justices &c., commanding them to make and issue a warrant for levying upon the goods and chattels of *William Ammerton*, esq. 18s. 4d., assessed upon him in a rate for the relief of the poor for the township of Long Preston, in respect of the tithes of that township. In answer to the writs for and against the motion, the following facts were stated:—

That the tithes having arisen, and actions being pending for the recovery of the same by the vicar of the parish of Long Preston (in which parish Hellifield is situated) and the inhabitants of the several townships within that parish, respecting the payment of the tithes to the vicar, it was finally agreed with them, that one principal proprietor of each township should, as trustee for the benefit of all parties, take from the vicar of the tithes within his township, a certain rent. Leases were accordingly prepared and executed in June, 1825, and in one of them, relating to the tithes of Hellifield,) in which a proviso was inserted, that if the party rated should refuse to pay the amount of the tithes, the vicar should be at liberty to distrain for the same. The want of certainty in the specification of some of the property included in a poor-rate, is a ground of appeal for refusing a mandamus to justices to issue warrants for the amount of a particular assessment. The defect is ground of appeal

ground of discharging a rule nisi for a mandamus to justices to enforce payment of the tithes, which the party rated has refused to pay, and for which the justices are bound to issue a warrant of distress, that since the granting of the rule a third party had offered the amount of the assessment to the overseer. In answer to such an application, that at the meeting of justices when the rate was demanded, the overseer came under a promise to prove that the payment of the tithes to the vicar was beneficial, and failed to do so, whereupon the justices decided against the rate,—although it was not necessary, in point of law, that the payment should have been beneficial. The overseer ought to have gone again, and, after saying that the occupation need not be beneficial, have demanded a warrant.

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rent of 30*l.* 6*s.* 1*d.* was reserved, the name of Mr. *Hammerton*, who was a principal proprietor in the township, was inserted as the lessee. Mr. *Hammerton* at first refused to accept the lease, but was afterwards prevailed upon to do so for the general good of the inhabitants of Hellifield. The expenses of the lease were paid to Mr. *Hammerton* by the tithe-payers of Hellifield. He took the lease without any intention of making any profit, and never did make a profit; but, with the assistance of some of the inhabitants, arranged the mode in which the amount of the rent should be apportioned amongst the proprietors and occupiers of land within the township. No more than the amount then agreed upon had ever been demanded or received of the several tithe-payers. Similar leases were executed in two of the other townships, in neither of which have the lessees ever been rated to the relief of the poor in respect of the tithes so leased to them. In April, 1834, a rate of 10*d.* in the 1*l.*, for the relief of the poor of the township of Hellifield, was allowed by Messrs. *Wilson* and *Coulhurst*, in which rate Mr. *Hammerton* was assessed thus:

| Occupiers' Names.    | Owners' Names.                               | Value. |    |    | Rate. |    |    |
|----------------------|----------------------------------------------|--------|----|----|-------|----|----|
| Jas. Hammerton, Esq. | For property in his own occupation, }        | £.     | s. | d. | £.    | s. | d. |
|                      |                                              | 85     | 16 | 7  | 3     | 11 | 6½ |
| Do.                  | Rev. Hy. Kempson, for tithes of Hellifield } | 22     | 0  | 0  | 0     | 18 | 4  |

Mr. *Hammerton* refused to pay the rate for the tithes, and he also refused to pay a part of the sum of 3*l.* 1*s.* 6½*d.*, on the ground that a part of the property so assessed as "property in his own occupation" was plantation, and not ratable. *Wilkinson*, the overseer, obtained a summons from the said two magistrates, for Mr. *Hammerton* to appear before them and shew cause why he refused to pay the rate. At the time of applying for this sum-

mons, *Wilkinson* expressly engaged to bring evidence to shew that *Mr. Hammerton* received *benefit* from his occupation of the tithes under the lease. Upon the parties appearing before the same justices, *Wilkinson* gave no proof that *Mr. H.*'s occupation was beneficial, and *Mr. H.* asserted that such was not the case, and that he never intended to or would receive any pecuniary benefit from the lease, although he believed that it would be in his power to do so. The magistrates, therefore, decided that *Mr. H.* was not liable to pay the rate in respect of the tithes, because he derived no benefit or profit from them, observing on the fact of *Wilkinson*'s having failed in performing his promise of bringing evidence to the contrary. The overseer then demanded a distress-warrant for the rate of 18s. 4d. for the tithes, which warrant the magistrates refused to grant. The overseer had deducted 17s. 8½d. from the rate, in respect of the plantation, and had received the remainder, with the exception of the 18s. 4d. for the tithes, from *Mr. Hammerton*. On a former occasion *Wilkinson* had appealed against an order for the allowance of the accounts of the then churchwardens and overseers of Hellifield, upon the ground (amongst others) that they had neglected to obtain from *Mr. Hammerton* an assessment made upon him in respect of the tithes of that township. The court of quarter sessions, (at which *Mr. Wilson* presided as chairman,) after hearing evidence, both for and against the appeal, being satisfied that *Mr. Hammerton* derived no *beneficial interest* from those tithes as lessee, confirmed the order.

*Subsequently* to the obtaining the rule nisi, certain persons, deputed by the majority of the inhabitants of Hellifield, had offered to pay to *Wilkinson* the sum claimed from *Mr. Hammerton* in respect of the tithes, but he refused to receive the same.

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and another.First point :  
Property rated  
not described  
in rate.

Sir *W. W. Follett* and *Milner* shewed cause. The rate is on the face of it bad, for not shewing distinctly in respect of what property Mr. *Hammerton* was rated. The overseers are bound to give to the parties rated reasonable information of the nature of the property in respect of which they are rated. In this very case, the overseer had mixed up property not liable to be rated with property ratable, and afterwards deducted it of his own authority. *Rex v. The Undertakers of the Aire and Calder Navigation*(a). The rate being bad, the magistrates cannot, of course, be compelled to enforce the payment of the amount of the assessments.

Second point :  
Lessee of  
tithes, without  
benefit, not  
ratable.

The principal question is, whether Mr. *Hammerton* was liable to be rated in respect of the *tithes*. He took those tithes as a mere trustee for the benefit of the inhabitants of the township, and lets them out again at an apportioned rent, he himself receiving no benefit from them. Mr. *Hammerton* cannot be said to be in the *occupation* of the tithes, and therefore he is not ratable in respect of them. [*Patteson, J.* Who then is ratable? The vicar is not so, because he has made a lease of the tithes.] Mr. *Hammerton*, at all events, is not ratable, for he has no beneficial interest and no occupation. If any body is ratable, the parties to whom the tithes are underleased, though there is no regular underletting, are so. Mr. *Hammerton* would probably bring an action against the justices if they issued a warrant.

Third point :  
That quarter  
sessions had  
held lessee not  
ratable.

This same question had already been before the quarter sessions, after an appeal against the allowance of the accounts of churchwardens and overseers of the township, and that Court decided that Mr. *Hammerton* was not ratable for these tithes. The overseer ought not afterwards to call upon two of the same justices, in direct

(a) 4 Dowl. & Ryl. 253; 2 Barnw. & Cressw. 713; 2 Dowl. & Ryl. Mag. Ca. 341.

opposition to the adjudication of the sessions, to issue their warrant.

Two of the inhabitants actually tendered the amount of the rate to the overseer, who refused to receive it. He ought to have accepted it. *Rex v. Cozens* and another (a), [Lord Denman, C. J. He cannot require a warrant of distress, if he can obtain payment of the rate from any body.]

The litigant parties were Mr. *Wilkinson* and Mr. *Hammerton*. The former went before the justices, upon an undertaking that he would prove that Mr. *Hammerton* took a *beneficial* interest under the lease, but failed to give any evidence to that effect. He should, at least, have gone again to the justices, and have said that it was immaterial whether the occupation of Mr. *H.* was beneficial or not, and then have applied for a warrant.

Sir *F. Pollock* and *J. L. Adolphus* contra. The offer to pay the rate was not until after the granting of the rule nisi, and was probably made in consequence of it. [Lord Denman, C. J. If the overseer was put to the necessity of moving for the rule, the subsequent offer to pay is no reason for discharging it.] The offer by other persons than Mr. *Hammerton* would leave the question unsettled for the future. It was a mere attempt to get rid of the rule, without giving the applicant the advantage sought.

The sessions never decided that Mr. *Hammerton* was not ratable. Their decision only went to this,—that the liability was not *so clear* that the overseers were bound to make good the amount in which Mr. *H.* was rated, notwithstanding that it had not been collected.

Then with regard to the form of the rate. The tithes

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and another.Fourth point:  
Amount of  
assessment  
tendered by  
others.

Fifth point:

Fourth point.

Third point.

First point.

(a) 2 Douglas, 426.

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are sufficiently described; and it is too much to say, that because *some* property contained in the rate is improperly described, therefore the *whole* rate is *void*,—for to that extent the objection goes. *Rex v. The Undertakers of the Aire and Calder Navigation* does not bear out the proposition for which it was cited. It only decides that it is good ground of *appeal* against a poor rate, that it does not appear upon the face of it, in respect of what property the assessment is made upon each individual charged. There are probably few rates which are not open to objections such as these; and if it were held that a rate was *void* by reason of such an informality, the Court would be much troubled with applications of this sort. [Lord Denman, C. J. There is no doubt that it is a very good ground of *appeal* that some property is badly described; but it is too much to say that the whole rate is therefore void. *Patteson, J. In Cortis v. The Kent Waterworks Company (a)*, it was held, that the want of sufficient certainty in the specification of property rated, cannot be made a ground of objection to an action for rates, but that the objection can *only be made by way of appeal*,—for which *Hutchins v. Chambers (b)* was cited.]

Second point.

The tithes are ratable in the hands of *some* party or other. The vicar is not liable, for he has let them. Who then is liable? Certainly the occupier, that is, Mr. *Hammerton*. [*Patteson, J. Mr. Hammerton* is certainly the occupier (c). Lord Denman, C. J. I believe we have no difficulty upon that point.]

Fifth point.

The last objection which has been urged raises a question of *bona fides*, which the Court will not probably think it right to try upon affidavits. Besides, there

(a) 7 Barnw. & Cressw. 314.

(b) 1 Burr. 580.

(c) *Vide Underhill v. Ellicombe*, M'Clelland & Younge, 450.

is a fallacy in identifying the person who undertook to give this evidence, and the rated inhabitants at large.

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LORD DENMAN, C. J.—All the parties seem to have thought that a *beneficial* occupation was necessary. As the parties met with a distinct understanding that the overseers would prove that Mr. *Hammerton* occupied beneficially, I think the magistrates were justified, upon their failing to do so, in refusing to grant the warrant. The overseers should have gone again to the magistrates, and have stated that they claimed to have a warrant, notwithstanding that the occupation was not shewn to be beneficial.

LITTLEDALE, J., PATTESON, J., and WILLIAMS, J. concurred.

Rule discharged without costs.

The KING v. The Justices of SUFFOLK.

**ROBERT HEWES** was indicted, at the Easter quarter sessions for the county of Suffolk, in 1835, for maliciously poisoning some horses belonging to his master. At the trial it appeared that the prisoner had administered to the horses a root cut into pieces, called *bank-break*, which caused a slow inflammation, of which they died. The defence set up by the prisoner was, that this drug was of a stimulating nature, and was frequently administered to horses to improve their coats, and that he had

Upon the trial of an indictment at the quarter sessions, that Court is the sole judge of the propriety of the entry of the verdict.

Where, therefore, upon a special finding by the jury, amounting to an acquittal, the chairman directs a verdict of guilty to be entered, the Court of K. B. will not grant a mandamus requiring the minute of the verdict to be altered according to the fact.

The only course open to the prisoner is to apply to the crown for a pardon.

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given the root to the horses for this purpose, and had not acted from a malicious motive. At the conclusion of the case, the prisoner's counsel contended that the prisoner was entitled to an acquittal, as there was no proof that the act was done maliciously, and he cited a passage from 3d *Institute* (a.) The chairman summed up the evidence, and the jury returned a verdict of "guilty by mischance." This verdict was entered by the clerk of the peace, in the minute book of the proceedings of the sessions. The counsel for the prisoner submitted that this finding of the jury was a good special verdict, and that the prisoner was upon that finding entitled to an acquittal. The chairman however told the jury that he could not receive this verdict, and that they must find in terms either that the prisoner was guilty or not guilty. The jury again retired, and after a short time returned and found the prisoner guilty, but recommended him to mercy. The chairman asked them upon what grounds they recommended the prisoner to mercy, and they said "Because we think it was not done with any malicious intention, but to better the condition of the horses." The chairman then directed the clerk of the peace to enter a verdict of guilty, which was done, and the prisoner sentenced.

In Easter term, *Byles* obtained a rule, calling upon the justices and clerk of the peace, to shew cause why a mandamus should not issue, commanding them to cancel the alteration made by the said clerk of the peace in the minute of the verdict, or to alter the minutes of the verdict so given, according to the fact.

*Biggs Andrews*, and *Sydney Taylor*, were about to shew cause, when they were stopped by the Court.

(a) If it be done by mischance or negligence, it is no felony, 3 Inst. 67.

LITLEDALE, J.—Was any authority shewn to the Court when this rule was obtained? In *Rex v. Curle* (a), the record was brought into this Court by writ of error.

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*Byles*, in support of the rule. If the record be brought in by writ of error, this Court cannot compel the amendment. But this Court has the power to correct the practice of an inferior Court, where it tends to injustice. This Court will interfere by mandamus, where an inferior Court, in a matter of practice, whether preliminary, or subsequent to a judicial investigation, violates the law. This power follows from the constitution of the Court. If the Court of Quarter Sessions neglect to enter continuances, this Court will compel them to do so where the justice of the case requires it. In *Rex v. Justices of the W. R. of Yorkshire* (b), the sessions having refused to hear an appeal, this Court granted a mandamus, commanding them to enter continuances and to hear the appeal. In that case it was contended that the justices were the proper judges of matters of practice arising at their sessions, and that their decision, unless manifestly wrong, ought not to be interfered with. Lord Denman, C. J. says, "I have always understood that this Court will interfere to see that no illegal practice prevails at the Court of Quarter Sessions." The verdict was properly entered, in the first instance, by the clerk for the peace. That is the only mode by which a verdict can be recorded at the time of delivery, as appears from what fell from Lord Tenterden, in *Rex v. Curle*; and the Court of Quarter Sessions had no right to direct the alteration of the minute. [*Patteson, J.* You do not wish us with any instance of the Court interfering

(a) 2 Barn. & Adol. 971.

(b) *Ante*, ii. 389.

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after the record has been made up.] There are ~~se~~ cases in which this Court has, on error, refused to amend; *Salter v. Slade* (a), *France v. Parry* (b), *M v. Richardson* (c). A writ of error is the proper remedy where the error is judicial and on record; a mandamus where the error is, as in this case, in a proceeding material or extra-judicial; *Com. Dig.* Mandamus, (A. this mandamus is refused, the trial by jury in Court Quarter Sessions may almost be dispensed with. If the Court entertain a doubt, the mandamus ought to be issued. [*Patteson, J.* If a man is improperly convicted before a Court of oyer and terminer, the practice does not apply to the judge. If we were to assume a jurisdiction in this case, it would extend to every Court in the kingdom. We might even interfere in a trial at bar, before the Court of Common Pleas. In *Rex v. Bowman* the mandamus was to *make up* the record.] In *The Justices of Wiltshire* (e), Lord Ellenborough said: "The magistrates certainly had a discretion to extend with respect to what was reasonable time for giving notice of appeal, but we have also a kind of *visita* jurisdiction over them, in the exercise of such discretionary power. In the case of an appeal respecting the settlement of a pauper, the Court of Quarter Sessions give judgment for the appellants, but refuse to award costs of maintenance; a mandamus lies to compel the Court to amend their judgment, by giving to the appellants the costs of maintenance" (f). The rule must be the same in criminal cases. Suppose the jury to return a verdict of "not guilty," and the chairman to direct

(a) 3 Nev. & Mann. 717.

(b) 1 Adol. & Ellis, 615.

(c) 9 Bingh. 125; 6 Bligh, 70;  
 2 Moore & Scott, 191.

(d) Reported as *Rex v. Jus-*

*tices of Middlesex, ante*, i

(e) 10 East, 404.

(f) *St. Mary's, Nottm v. Kirklington*, 2 Bott, 750.

verdict of "guilty" to be entered,—surely this Court would interfere. Here, there was a mistake in practice, subsequent to the judicial proceeding. A jury may, in criminal as well as in civil cases, insist on giving a special verdict, and it was formerly their safer course, for if they gave a false verdict, they were liable to attain (a); *Dowman's case* (b); 2 *Hale's Pleas of the Crown*, 302; 4 *Bla. Com.* 360. The finding of the jury in this case was a good special verdict. The verdict amounts to an acquittal, for the word "guilty" may be rejected as a conclusion of law repugnant to the premises; *Bacon's Abr. Verdict, E., Foster v. Jackson* (c), *Priddle v. Napper* (d); indeed it is not necessary to reject the word "guilty," for that may mean guilty of the trespass.

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LITLEDALE, J. (e).—I am of opinion that we have no power to issue this mandamus. The rule is for a mandamus to cancel the alteration made by the clerk of the peace, or to alter the minute of the verdict according to the fact. It may be admitted that this Court has a species of superintending jurisdiction over inferior Courts, but we must see that this jurisdiction has before been exercised in the manner now proposed. It is urged that we interfere with the Court of Quarter Sessions, and oblige them by mandamus, in certain cases, to enter continuances and hear an appeal. In those cases this Court merely puts the Court of Quarter Sessions in motion, and obliges them to decide. In *Rex v. Bowman* (f),

(a) But not if the indicted were found guilty, as then he would have been convicted by 24; 1 *Roll. Abr.* 280; nor upon a verdict on an appeal of felony, *F. N. B.* 107, (L.)

(b) 9 *Co. Rep.* 12 b.

(c) *Hob.* 53.

(d) 11 *Co. Rep.* 9.

(e) Lord *Denman*, C. J. had left the Court to sit as Speaker of the House of Lords.

(f) *Vide ante*, 225, (d).

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this Court merely directed the Court of Quarter Sessions to *make up* the record; and *that* was done after some difficulty. We have no authority to interfere with the practice of other Courts *in this way*. At the assizes, disputes sometimes arise as to the mode of entering the verdict. If we interfere in this case, we may as well interfere with the proceedings at the assizes (*a*), or with the proceedings of any other Court in the kingdom. Whether the verdict is entered properly or improperly, is matter for the consideration of the Court in which the trial takes place. The finding of the jury might perhaps amount to something to be returned, but as no instance has been given of an exercise of jurisdiction in a similar case, this rule should, in my opinion, be discharged.

PATTESON, J.—If there had been any *authority* for this course of proceeding, we should have been desirous to proceed to ascertain whether justice has been done in this case. But as no authority has been adduced, we ought not, in my opinion, to interfere. The cases cited, in which this Court has by mandamus compelled the Court of Quarter Sessions to enter continuances and hear an appeal, do not resemble this case. The Court, by *ordering continuances* to be entered, is only supplying *a defect*, and the mandamus in such cases commands the Court of Quarter Sessions *to hear* an appeal. It is necessary that there should be continuances entered, to give the Court of Quarter Sessions *jurisdiction*, and for that

(*a*) As the judge of assize acts under the authority of the Court out of which the record issues, the Courts above do exercise control over verdicts found at

nisi prius; *secus* as to verdicts found before justices of oyer and terminer or of gaol-delivery, who derive their authority solely from the crown.

purpose they are directed to be entered. So, if it were necessary, as in *Rex v. Bowman*, that a record should be *made up*, this Court would interfere by mandamus, as it did in that case. But I have always understood that this Court would send a mandamus in *general* terms, and would not require the inferior Court to do a *specific act* in a *particular* mode. It would be wrong to issue a mandamus merely for the sake of a return. If the jury really did mean that the prisoner should be acquitted, the proper course is to apply to the secretary of state.

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WILLIAMS, J.—I see no reason why we should interfere by mandamus. Where the Court of Quarter Sessions altogether decline to hear a matter which is within their jurisdiction, this Court has the power to issue a mandamus to compel them to do so. But we do not direct a mandamus to do a specific act. If parochial officers refuse to make a rate, this Court will, if necessary, compel them to make one, but we do not command them to make an equal rate (*a*). Were we to interfere in this case, we should be doing that for which no precedent can be adduced. I cannot distinguish this from any other point in practice.

Rule discharged.

(*a*) 1 Nol. P. L. 62.



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The KING v. The Justices of the Town and County of  
the Town of NOTTINGHAM.

All business relating to the assessment, application, and management of the county rate, must be transacted by the justices in *open Court*; but no rate-payer or person not being a member of the Court, is entitled in any way to interfere with the exercise of the jurisdiction of the justices in respect of such assessment, &c.

Therefore, a rate-payer present at an adjourned sessions held for the purpose of allowing the accounts, &c. to be charged upon the county rate, is not entitled to inspection of such accounts, &c., previously to their allowance.

Although it appear that such accounts, &c. were inspected, examined, and the amounts adjusted at a *private* meeting of justices held previously to such adjourned sessions, and that at such sessions the accounts, &c. were allowed, upon the *total* amounts thereof, and the names of the parties to whom due, being openly *read* in Court.

*Semle*, that a rate-payer is entitled to inspection of such accounts, &c. upon application on a day *subsequent* to the allowance.

A Rule had been obtained, calling upon the above justices to shew cause why a mandamus should not issue commanding them to permit *C. D'A. Shelton* to inspect and examine, and to have copies or extracts of, the several bills, accounts, vouchers, and papers, exhibited to and allowed and passed by them at the general quarter sessions of the peace, holden by adjournment, in and for the said town and county, on 30th April last, and the amounts whereof were then and there by them directed to be paid out of the county-rate of and for the said town and county. The affidavits of Mr. *Shelton* (an attorney), upon which this rule was obtained, stated, that he was ratable in the parish of St. Mary, Nottingham; that on 9th April a general quarter sessions for Nottingham was held, and adjourned to 30th April; that public notice was given that on that day the business appertaining to the assessment, application, and management of the county-rate would commence; that at such adjourned sessions, several bills or accounts of charges and disbursements for business and matters done and performed, and intended to be directed to be paid out of the sums to be received by the overseers of the respective parishes in Nottingham, as and for the rate to be assessed upon the inhabitants of the respective parishes, called the county-rate of Nottingham, were

uced by the clerk of the peace and treasurer of the  
 city of the town, and that it was then publicly stated  
 him that the several bills and accounts had been pre-  
 viously examined, audited, and allowed at a *private*  
 meeting held by the magistrates for that purpose; that  
 such private meeting was held on the Friday preceding  
 April 9th, and that such bills were then and there ex-  
 amined, &c.; that the deponent, at such adjourned ses-  
 sions, required to be permitted to look at and inspect  
 the items of such bills, &c., at the same time stating that  
 he claimed a right to look at and inspect the same, with  
 a view to obtain and give information as to the propriety  
 of the same being allowed and paid out of the county-  
 rate; but that the Court publicly stated and decided  
 that they would not allow or permit of any inspection of  
 or interference with any of the said accounts, by any  
 person or persons present, other than the Court, or some  
 or one of the members thereof; that the *amount* of such  
 bills, and the names of the persons to whom they were  
 owing, were publicly read, and many of them allowed  
 without any particular inspection of the items taking  
 place on that occasion; that it had been and still con-  
 tinued to be the constant usage of the magistrates of  
 Nottingham, to hold *private* meetings a short time be-  
 fore every general quarter sessions, for the purpose of  
 examining and inspecting at such meetings the items of  
 the several bills, &c. to be charged upon and disbursed  
 out of the county-rate; and that at such meetings the  
 said bills were examined and inspected, and the respec-  
 tive total amounts adjusted and finally settled; that de-  
 ponent's attention had for many years been called to the  
 disbursements and payments made out of the county-  
 rate, and that if he were permitted to examine and in-  
 spect, and have copies and extracts of the several bills,  
 &c., produced at the said adjourned sessions, and allowed

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and directed to be paid out of the county-rate, he should be able satisfactorily to make it appear, that many sums of money, to a large amount, have been illegally and improperly charged upon the county-rate.

*Campbell, A. G. and Amos*, now shewed cause. This application is grounded on a misapprehension of the act of 4 & 5 *W.* 4, c. 48. That act is declaratory, and does not, in the slightest degree, alter the jurisdiction or the power of the justices. Before the passing of this act, bills were to be allowed *by the justices*; and by this act it is enacted, that all business relating to the assessment and application of the county-rate shall be transacted in open court. It does not follow from this enactment, that every stranger or even every rate-payer, is to have a right to inspect the bills and accounts, and enter into a discussion as to the propriety of allowing them. Such discussion was the object which the party had in view when he required the inspection of the bills, &c. *Mr. Shelton* did not apply for an inspection of the orders *after* the allowance.

*G. T. White* contra. Before the passing of this statute it was held, in *Rex v. Justices of Leicester* (a), that a mandamus lies to the justices and the clerk of the peace of a borough, to permit the attorney for and on behalf of persons contributing to the county-rate, "to inspect and take copies of the last two rates made for the borough, and all orders made for the expenditure of the same, and the several orders of sessions made thereon, and all other proceedings and documents relating thereto." The application in that case was very similar to the present. Afterwards, the act of 4 & 5 *W.* 4, c. 48,

(a) 7 Dowl. & Ryl. 370; 3 Dowl. & Ryl. Mag. Ca. 433.

passed. That act, after reciting that doubts had arisen whether it was requisite that the business relating to the assessment, application, and management of the county-rate, should be transacted by the justices publicly and in open court, at their general or quarter sessions, or any adjournment thereof, and that *a practice had in many counties prevailed of transacting such business in private, which had been found inexpedient*,—for the removal of such doubts, and the prevention of such practice for the future,—declared and enacted, that, thereafter, all business pertaining to the assessment, application, or management of the county-rate, or to any matter in respect whereof the county-rate is chargeable, which the justices are authorized and directed to do and transact at the general or quarter sessions, or at any adjournment thereof, *shall be done and transacted publicly and in open court, at such general or quarter sessions, or adjournment thereof, and not otherwise*. Here, the business was in fact transacted at the *private* meeting, in accordance with the former practice of these justices, though the *formal* allowance took place in open court. The object of this act will be defeated if such an evasion of its provisions be allowed. That object was, it is submitted, that all rate-payers should be permitted to inspect the accounts of the expenditure, and to discuss each item, if they thought proper, in court. It is not, however, necessary to go this length for the purposes of the present application.

Lord DENMAN, C. J.—It appears to me that this rule must be discharged. The party wishes to inspect and examine, and to have copies or extracts of the several bills and accounts allowed by the justices, and the amounts whereof were ordered by them to be paid out

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of the county-rate. It does not appear that he might not have had all that he asks. Perhaps, if he had applied after the allowance, he might have been permitted to have such inspection, &c. At the time, however, when the application was made, the Court were right in refusing to grant that which was demanded. Supposing, therefore, that *Rex v. The Justices of Leicestershire* be good law, I still think that this rule cannot be made absolute.

LITLEDALE, J.—The application should have been made after the business was completed,—as upon some subsequent day.

PATTESON, J.—If we make this rule absolute, we should make all the rate-payers of the county auditors, as well as the justices. The act only means that what the justices do shall be done by them in public.

WILLIAMS, J.—I am of the same opinion. It was not intended that the rate-payers should have a right to interfere. That would be destroying the jurisdiction of the justices. This application goes too far, and is premature.

Rule discharged.



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## REX v. JOHN WILSON.

CONVICTION by two justices of the peace, for a forcible detainer. The return to a certiorari issued to the justices set out the conviction, (which see *ante*, ii. 84, upon a former application in this case;) and also the requisition by twelve good and lawful men before the said justices and another, who say that the said J. W., the said messuage whereof B. and S. were lawfully peaceably seised in fee, unlawfully did enter, and the said B. and S., of and from the said messuage aforesaid, lawfully ejected, expelled, and removed, and the said messuage from the said B. and S. unlawfully with strong hand and armed power did hold and from them detain. The requisition was indorsed a memorandum of restitution made by the same three justices, to *Bates and others*.

*J. D. Hill* now moved to quash the conviction. He contended that the conviction was bad, by reason of the absence of any adjudication by the magistrates, that the entry of the defendant had been unlawful as well as the detainer forcible; and he relied upon *Rex v. Oakley* (a).

*Mr. W. W. Follett*, in support of the conviction, referred to the statutes 5 Ric. 2, c. 8, 15 Ric. 2, c. 2, and 1 Hen. 6, c. 9; and contended that the magistrates were empowered to convict upon *their own view* of a forcible detainer, without any evidence of the character of the entry. He contended that the decision on the general point in *Rex v. Oakley* did not apply, as in this case the return states an unlawful entry, and that the observation of *Patteson, J.* in that case, by which he supposed

A conviction for a forcible detainer, under 8 H. 6, c. 9, must shew an unlawful entry as well as a forcible detainer.

And therefore a conviction for a forcible detainer, which states an information and complaint of an unlawful ejection and forcible detainer, but in which the justices profess to convict solely upon their own view of the forcible detainer, is bad.

Justices cannot convict of a forcible detainer upon their own view of the detainer, without evidence that the entry was unlawful.

(a) *Ante*, i. 41; 4 Barnw. & Adol. 307.

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that learned judge to have sanctioned the precedent in *Rex v. Elwell* (a), was in favour of the present conviction, which closely followed that precedent. [*Patteson*, J. I did not mean to say that the precedent in *Lord Raymond* is good. Magistrates cannot, upon their own view of the detainer, know any of the circumstances of the entry.] It is sufficient, to bring a party within the act, that the magistrates see him detaining the land by force, for the statute says nothing of an unlawful entry. [*Patteson*, J. Then the act is one for the benefit of trespassers. It is impossible to say that I am not to detain my property by force, against a person attempting to take it from me.] The paramount object of the statute was to prevent breaches of the peace. [Lord *Denman*, C. J. It appears to be a violent outrage of common sense to say that the magistrates are to act upon the mere view of a forcible detainer.] *Regina v. Layton* (b), *Hawkins P. C.*, Book 1, c. 28.

LORD DENMAN, C. J.—That case of *Regina v. Layton* is very singular. The Court took time to consider of their decision, as it would seem by the report, but their ultimate determination is not stated.

*Cur. adv. vult.*

On a subsequent day the judgment of the Court was delivered by

LORD DENMAN, C. J., who, after reading the conviction, inquisition, and indorsement thereon, proceeded as follows:—

This conviction has been questioned before us on the

(a) 2 *Ld. Raym.* 1514; 3 *Ld. Raym.* 360.

(b) 1 *Salk.* 156, 353, 540.

and that no *unlawful entry* is averred even in the indictment, or proved by evidence, or adjudged by the justices; and we are of opinion that the conviction is for these reasons, perhaps for some others also.

The justices have proceeded on the statute 8 *Hen. 6*, joining up two statutes of *Ric. 2*, the object of which, according to *Hawkins*, is to prevent breaches of the peace by parties forcibly asserting their own rights. The earliest statute merely prohibits the offence of *forcible entry*, on pain of imprisonment; the second gives summary power to the justices; the third extends the remedy to cases where the entry may have been *peaceable*, but is allowed up by a *forcible detainer*.

In the case of *Rex v. Oakley*(a), we had to consider of a conviction precisely similar to the present, except that neither averred an unlawful entry nor an unlawful execution,—the present conviction alleging the latter only: all agreed (*Parke, J.* indeed not without some hesitation) that though by the third statute above mentioned, original entry need not be *forcible*, it must have been *lawful*, to give the magistrates jurisdiction. We see no reason now for entertaining a different opinion, for otherwise the manifest consequence would be, that a man seised in fee, and unlawfully dispossessed, who could afterwards peaceably recover his possession and maintain it by force, might be ejected, fined, and imprisoned by two justices; but the statute will not be found to invest them with such a power. The 5 *Ric. 2*, is in these terms:—"The king defendeth that none from henceforth make any entry into any lands and tenements in case where entry is given by the law; and in such case not with strong hand, &c.; and if any man from henceforth do to the contrary, and be thereof lawfully convicted, he shall be punished, &c." The 15 *Ric. 2*,

(a) *Suprà*, 233 (a).

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requires that the former statute be carried into effect; and further, that at all times when such forcible entry shall be made, and complaint thereof come to the justices of the peace, they shall go to the place and commit the offender to prison. The statute of *Hen. 6* gives the like remedy in the case there described. The foundation of the proceeding, then, is not the *complaint*, but the *fact*,—a fact which, we think, should be proved to the satisfaction of those who are to exercise the power, and should appear on the face of the conviction.

In what I am reported to have said in *Rex v. Oakley*, it appears that I thought that the justices had there adjudged the keeping out to be *unlawful*, and that I held the adjudication bad for want of specifying the facts from which its unlawfulness was inferred. Speaking for myself, I think that holding correct, though not necessary for deciding that case or the present. For, in the conviction before us, the party interested is said to have complained (not even upon oath) that he was expelled, but the justices heard no evidence, and came to no other decision on the fact than this,—that finding and seeing the defendant unlawfully with strong hand and armed force *holding possession*, it is considered that *J. W.* of the *detaining* aforesaid with strong hand, by our own proper view is convicted; he is then sentenced to fine and imprisonment.

Now it is plain that the *view* of the justices, though it might embrace a *forcible* detainer, could give them no information as to its *unlawfulness*. The fact, of which they are eye-witnesses, is in its own nature indifferent, as the rightful owner in peaceable possession may be seen defending his possession by force, and would be justified in so doing. If the possession so defended were an unlawful possession, that should be proved to the justices and adjudged by them.

A substantial doubt of the goodness of the conviction, arises here from its not shewing that the party was summoned or had the opportunity of defending himself against the *ex parte* charge. *Hawkins* lays it down that this is necessary with reference to another provision of

*Hen. 6*: "As the justice is bound to stay the award of restitution, upon the defendant's tendering a traverse of the force, so it hath also been said that he ought not to make such an award in any case in the defendant's absence, without calling him to *answer* for himself; for it is implied by natural justice in the constitution of all laws, that no one ought to suffer any prejudice thereby, without having first an opportunity of defending himself." For this he quotes *Savill*, 68, where *Wray*, C. J., speaking of his own practice under 8 *Hen. 6*, said that he never useth to grant restitution without hearing the party indicted. *Hawkins* cites also *Ateyn*, 78, where *Roll*, C. J. agreed that one may be indicted for not taking the oath of headborough when duly appointed; but then he ought to be *warned* to appear before a justice of the peace, there to take his oath: and for want of that, and for another objection, the indictment was quashed.

My brother *Parke* observed in *Rex v. Oakley*, that when a complaint is made, the party has the opportunity of traversing the facts, and must be taken to admit them if he omit to do so. But in the present case, if not in every similar case, the party had no such opportunity, not having been present when the complaint was made. He could not then traverse the complaint, nor could he confront the witnesses, for none were examined, nor was he summoned. Every thing is done behind his back till he is found and seen detaining the possession, whereupon he is arrested and imprisoned. When the inquisition is thereupon found, that may indeed be traversed by the

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party; and, according to C. J. *Wray*, he must be summoned before the award of restitution. The disadvantage under which he will dispute the facts, if already thrown into prison, need not be dwelt upon; and there seems no stronger reason for summoning him in the last stage to defend his *property* than in the first, when he may be deprived of his *liberty* and *fined*. This objection, however, is not among the points set down for argument, nor one of those on which the judgment of the Court is founded.

The precedents and authorities were supposed to sanction the present conviction, but they are very scanty; and, indeed, *Layton's* case may almost be said to stand alone.

That was a conviction by the Lord Mayor, for a forcible detainer after a forcible entry of the Fleet Prison; by which *Layton* was fined 100*l.*, and imprisoned quousque. One objection was, that it did not negative three years' peaceable possession; but this was held unnecessary, because that is matter of defence given by a proviso.

The Court also said, that "the conviction was traversable because the party is to be imprisoned;" but this is no authority for asserting that a complaint alone is sufficient to warrant a conviction; and if it were, it would only prove the conviction bad for want of summoning the party to answer such complaint. With regard to the particular point raised herein, on which we decided *Rex v. Oakley (a)*, viz. the want of averring that the defendant's entry was either forcible or illegal, no judgment was given. Sir *James Montagu* took exception that the complaint was of a forcible entry and detainer, but here is no forcible entry at all; and a man's house is his

(a) *Ante*, vol. i. 41; S. C. 4 Barn. & Adol. 307; *ante*, 233.

which it is lawful for him to defend with force. *lv. vult.* Thus far the report. Mr. *Dealtry* has the warrant for *Layton's* committal to Newgate, date March 27, 1705. The objection we are considering certainly appears upon the face of it, it has been overruled by the great authority of this Court ultimately committed *Layton* by virtue. This fact, however, is not certain nor very clear; for the commitment just referred to is undoubtedly imperfect, being for an indefinite period, and being imposed. But we have been furnished the same quarter with a second commitment dated later, and executed in all probability when the terms of the first were discovered. In this the Lord says he has fined the parties 100*l.* each, but the terms of which, on his own view, he convicts them, is riot and forcible detainer. This is manifestly the opinion reported by *Salkeld* (a), on which the Court came to consider. But the records of this Court shew, that *Layton* and the others were ordered to bail to answer to an indictment preferred against them at the Old Bailey sessions on the 18th April, 1705, for riot and assault in the Fleet. It does not appear they were found bail; and in Easter term of the same year they were committed to the Marshal. As we find their record of these proceedings they probably were not pressed to a legal decision; and it remains at issue whether the imprisonment was upon the ground of riot conviction or for want of bail. *Layton* had been in the Fleet, and forfeited the office in 1699, which was affirmed in parliament in 1704. The office was again granted to him in January, 1707. Altogether, these circumstances wear the appearance of a compromise.

(a) 1 Salk. 353.

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In *Rex v. Elwell* (a), a conviction very like the present was brought before the Court and quashed. The objection was, that imprisonment was awarded till fine paid, and that no fine was set.

The form of that conviction is copied into *Burn's Justice* from the third volume of Lord *Raymond*, and was contrasted by my brother *Patteson*, in *Rex v. Oakley*, with that which was there held bad on another ground. It was thence inferred that he approved of the form in *Rex v. Elwell* in every other particular, but surely no mode of arguing can be less just. One fatal objection is sufficient in each of these cases, and in deciding *Rex v. Elwell*, it was not necessary to enter into that now before us.

The fact appears to be, that summary convictions on these statutes were at all times of rare occurrence, and that parties were in the habit of proceeding to obtain restitution by the safer course of *indictment*. But far greater precision was required in the form of this indictment than is found in this summary conviction. See *Fitzwilliam's* case (b), and many other cases collected in *Vin. Abr. tit. "Forcible Entry"* (c), and in 1 *Hawk. Pl. Cr.* p. 495.

Upon the whole we think the conviction bad for these reasons, and it follows that the inquisition founded upon it must also be quashed.

Conviction and inquisition quashed.

(a) 2 *Ld. Raym.* 1514.

*Jac.* 19.

(b) *Cro. Eliz.* 915, and *Cro.*

(c) 13 *Vin. Abr.* 379, &c.



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PON an appeal against an order of justices for the removal of *John Cuthbert*, his wife and family, from *epstone*, Leicestershire, to Saint Mary, in the borough Leicester, the sessions confirmed the order, subject to opinion of this Court on the following case :

The respondents proved that *Cuthbert* was born in the *wellant* parish. This was met by the appellants proving that *Cuthbert's* mother, before her marriage, acquired a settlement by hiring and service in St. Martin's, Leicester. The sessions confirmed the order, on the ground that no evidence had been offered to shew that the *father Cuthbert* had no settlement (a).

A *prima facie* case of settlement by evidence of the place of birth of the pauper, may be answered by proof of the maiden settlement of his mother, without shewing that his father had no settlement.

*Humfrey* and *Burnaby*, in support of the order of sessions. In *Rex v. St. Matthew, Bethnal Green* (b), rule is clearly laid down that children are to follow settlement of their father, if it can be known ; and that if it can be known, then recourse cannot be had to mother's settlement. In this case the appellants did attempt to trace the settlement of the father. If it is sufficient, in a case like this, to shew the place of settlement of the mother, it will also be sufficient to shew place of settlement of the maternal grandmother, or of other more remote ancestor on the mother's side. The confusion would be great, and it would open a wide door for fraud. The respondents can never be in a position to contest a place of settlement of every remote ancestor of the pauper, and it would not be difficult for

(a) It would, perhaps, be difficult to say by what evidence this negative proposition could have been established.

(b) Burr. S. C. 485.

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the appellants to suppress the evidence of the settlement of the father. In *Rex v. Harberton* (a), an order for the removal of a wife and daughter, was held to be supported, *primâ facie*, by shewing that the parish to which the removal was made was the place of the wife's maiden settlement. But in that case the attention of the Court was not called to *Rex v. St. Matthew, Bethnal Green*. [Lord Denman, C. J. What was there said, was without any discussion.] The *facts* of the two cases are also in some measure distinguishable. In *Rex v. St. Mary, Beverley* (b), upon the trial of an appeal against an order by which a wife had been removed to her maiden settlement, the respondents proved that the wife's maiden settlement was in the appellant parish, but it appeared upon the cross-examination of one of the respondents' witnesses that the husband was born in some part of Ipswich. The Court held, that it was incumbent on the respondents to shew that the pauper was settled in the parish to which the removal was made, and that they had disproved that by shewing that the *husband* had a birth-settlement in another parish.

*J. Hildyard* and *White*, *contra*. It was incumbent on the respondents to remove *Cuthbert* to the place of his settlement. Either his father had a settlement or he had not. If he had no settlement, then the mother's place of settlement was that of the child. If he had a place of settlement, then the respondents have removed to the wrong parish. The maxim, *de non apparentibus et de non existentibus eadem est ratio*, applies. The presumption of law is, that the father had no place of settlement, as none was shewn. The settlement by birth, on which the respondents relied, depends on this very

(a) 13 East, 311.

(b) 1 Barn. & Adol. 201.

maxim of law. It was incumbent on the respondents, before removal, to inquire first, whether *Cuthbert's* father had a settlement, and if he had none, then to ascertain the mother's settlement. They make neither of these inquiries, but rely on a settlement by birth, which assumes that a search has in vain been made for the settlement of both parents. In this view of the case, the whole of the authorities are reconcileable. In *Rex v. St. Mary, Beverley*, it was determined, that the burthen of proof was on the respondents, who had removed the pauper, and that was the principle of the decision. In *Rex v. Woodford (a)*, it was held that the birth of the pauper is sufficient *primâ facie* evidence of the settlement to call for an answer from the other side. In this case, that *primâ facie* case *was* answered. In *Rex v. Harborton* it was said, that there could be no doubt that the evidence offered, of the wife's maiden settlement, was *primâ facie* sufficient, but that it lay on the appellants to rebut it. Here the *primâ facie* case made out by the respondents *has* been rebutted. In *Rex v. Wakefield (b)*, it was said by *Le Blanc, J.*, that "the place of birth is the *weakest* evidence of settlement." Proof of such settlement is therefore rebutted by shewing the settlement of the mother.

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Lord DENMAN, C. J.—My first impression was, that according to the rule laid down in *Rex v. St. Matthew, Belnal Green*, it was incumbent on the appellants, who are to rebut the *primâ facie* case made out by the respondents, to prove the father's place of settlement, and if, after diligent search, that could not be found, that then only they might resort to the settlement of the mother. But the respondents rely altogether on the

(a) 2 Bott, P. L. 13.


(b) 5 East, 338.

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birth-place of the pauper. Undoubtedly, if neither the father nor mother have gained a settlement, proof of the place of birth is sufficient. It is, however, a mere *primâ facie* case, which admits of the answer, that *either* the father or the mother was settled elsewhere. In this case it was shewn that the mother was settled in a parish other than that to which the removal was made. The sessions have, therefore, done wrong in affirming the order.

LITLEDALE, J.—The pauper was born in wedlock. No account was given by the respondents of the place of settlement of either of his parents. Therefore, proof of where the pauper was born was *primâ facie* evidence of the place of settlement. This was relied on by the respondents. It was competent then for the appellants to rebut this *primâ facie* case, by proving that the mother had, before her marriage, acquired a settlement elsewhere. That might, undoubtedly, have been displaced by proof of the place of settlement of the father; but proof of the father's settlement, is only one mode of answering the *primâ facie* case arising from proof of the place of birth. The case, therefore, stands thus: The respondents have made out a *primâ facie* case by proving *Cuthbert's* place of birth, and the appellants have rebutted that case by proving the mother's place of settlement.

PATTESON, J.—What is called a birth-settlement is the weakest species of settlement; and if one better is shewn, it is destroyed. A child is settled in the place where it is born only when no other settlement can be ascertained. The appellants prove that the mother had a place of settlement, and that destroys the settlement by birth.



WILLIAMS, J.—I concur in that view of the case. It is quite clear, in the words of *Le Blanc, J.*, that “the place of birth is the weakest evidence of settlement.” Evidence of the place of birth was given by the respondents. What is the next proof? Evidence of the settlement of the mother:—And this is an answer to the respondents’ case, on the assumption made by the respondents themselves,—that the father had no settlement,—by relying on the place of birth, which would not be the place of settlement, unless the father had no settlement.

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Order of Sessions quashed.

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3Y 56 Geo. 3, c. xxxix. “for building a new church and parochial chapel in the parish of St. Pancras, in the county of Middlesex, and for other purposes relating

The trustees appointed and acting under a local act of parliament for building a

church, which authorizes them to levy rates upon the inhabitants of the parish, and directs that the accounts shall be audited and allowed by the quarter sessions, are, nevertheless, compellable, under sect. 34 of the General Vestry Act (1 & 2 Will. 4, 60,) to produce and explain their accounts before the auditors of the parish accounts, appointed under, and in consequence of the adoption of, the last-mentioned act.

*Seem*, that all Boards, &c. having power to levy rates on the inhabitants of a parish which adopts the General Vestry Act, are compellable to produce and explain their accounts before the auditors.

Auditors of parish-accounts, appointed under that act, can hold meetings only in the board-room of the vestry.

A mandamus to appear, and produce and explain accounts to auditors, cannot affect the parties to appear, &c. “at such time and place as the auditors may point and give notice thereof,” where by statute the parties are only required to appear at a meeting directed to be held at a certain place.

When, upon a motion to quash the return to a mandamus for insufficiency, and issue a peremptory mandamus, the matter is set down in the crown paper for argument, the counsel for the Crown is entitled to begin, although the counsel for the defendants propose to urge objections to the mandamus itself.

The Court has power to mould the rule for a mandamus, but cannot re-mould the writ after it has issued, and award a peremptory mandamus in a more limited form than the original mandamus.

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thereto," certain persons were appointed trustees for carrying the act into execution.

Sect. 16 enacts, that fair and regular entries shall be made in books to be provided for that purpose, of all the acts, orders, regulations, and proceedings of the trustees relative to the execution of the act.

Sect. 19 empowers the trustees, by order in writing, to direct their treasurer, from time to time, to pay such sums of money out of the several moneys raised by virtue of that act, to such persons and in such manner as they shall think necessary.

Sect. 67 authorizes the trustees, as they may think necessary, by writing under their hands, to make rates on the occupiers of lands, tenements and hereditaments within the parish, not exceeding two pence in the pound in any one year, until a certain rate, called the sinking fund rate, shall cease, nor four pence in any succeeding year; all which rates are vested in the trustees, to be by them applied for the purposes of the act, and are to continue until payment of the building of the new church shall be made, and so long as any of the moneys to be borrowed and raised by sale of annuities and otherwise, shall remain due.

Sect. 77 enacts, that an account shall be kept by the trustees, of the rates to be made in pursuance of the act, and that the trustees shall cause all receipts, payments, debts, credits, and minutes of contracts, and all other their proceedings, to be entered into a book or books to be kept for that purpose; and that all books and accounts of the trustees, shall at all seasonable times be open to the inspection and perusal of any person liable to pay rates by virtue of the act; and that once, at least, in every year during the execution of this act, the trustees shall make a true statement or account of all sums of money by them received and expended; and such

statement or account, when so made, together with the vouchers relating thereto, shall be by them laid before the justices of Middlesex assembled in quarter sessions, to be by them examined and allowed; and the balance of such account shall by such justices be stated in the book of accounts, to be kept in the office of the clerk to the trustees; and that no charge or item in such accounts shall be binding on the parties concerned or valid in law, unless the same shall have been duly allowed by such justices.

By another local act, 1 & 2 *Geo. 4*, c. xxiv., the powers of the trustees are considerably extended, and they are authorized, by writing under their hands, to make rates not exceeding four pence in the pound.

The General Vestry Act (1 & 2 *Will. 4*, cap. 60,) was adopted (a) by the parish of St. Pancras.

By sect. 27 of that act it is declared, that nothing therein shall be construed to repeal or alter any local act for the government of any parish by vestries, or for the management of the poor by any board of directors and guardians, or for the due provision of divine worship within the parish, and the maintenance of the clergy officiating therein, otherwise than was by that act expressly enacted regarding the election of vestrymen and auditors of accounts.

By sect. 33 it is enacted, that in any and every parish adopting this act, the parishioners duly qualified to vote for vestrymen shall, in the manner therein directed, elect five rate-payers to be auditors of accounts.

Sect. 34 enacts, that the auditors of accounts shall meet twice at least in each year *at the board-room of the Vestry*, and (a majority of the auditors being present) shall proceed to audit the accounts of the Vestry for the

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(a) Under the power of adoption given by s. 1.

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preceding half-year, in presence of the vestry-clerk, and requires the Vestry, by their clerk, to produce and lay before the auditors, at every such meeting, a true and just statement or account in writing, accompanied with proper vouchers, of all sums of money which may have come to the hands of the Vestry or of their treasurers, and also of all moneys paid, laid out, or expended by them, or by any churchwardens, overseers, surveyors, or other persons by them employed, and responsible to the Vestry, since the last period up to which the accounts of the Vestry were audited; and directs that *in all parishes in which other boards shall have control over any part of the parochial expenditure, the auditors shall have the same power of examining the accounts and officers thereof as of examining the accounts and officers of the Vestry, and shall audit the accounts of the Boards in the same manner as they audit the accounts of the Vestries.*

Sect. 35 enacts, that the auditors shall have power to summon and call before them by writing, &c. any parish-officer or other person or persons concerned in the said accounts, and to require of them to attend the auditors *at any meeting or adjourned meeting*, and to bring with them all books of account, writings, papers, and documents required, which may concern the said accounts, and to give such information as to the particulars of such accounts as they shall be able to give; and any parish officer or other person refusing so to attend, or otherwise wilfully obstructing the purposes of such inquiry, shall be deemed guilty of a misdemeanor.

Sect. 36 enacts, that the accounts, when audited and approved by the auditors, shall be signed by them in the presence of the clerk of the Vestry, who shall also affix his signature to the same, and that it shall be lawful for the auditors to subjoin such remarks thereto as to them shall seem meet.

7 enacts, that the accounts, when so audited, shall remain at the office of the clerk of the said parish, and shall, after such audit, be open and accessible to the examination, at all seasonable times, of any creditor on the rates thereof: Provided that nothing in the act contained relative to the consent and duty of auditors, shall debar the parish from any remedy before possessed.

nisi was obtained for a mandamus to the trustees under the two local acts, commanding them to call a meeting of the auditors of accounts of the parish, and bring with them and produce at such meeting all books containing an account of all moneys received and of all moneys paid—between Lady-day and Easter-day, 1833.

*Messrs Scarlett and Platt*, in Hilary term, 1834, demurred, and contended that the provisions of the General Vestry Act, respecting the auditing of parish accounts, could not apply to the accounts of the trustees, as the Legislature had already provided a mode of auditing parish accounts, viz. before the quarter sessions.

*Messrs Bell, S. G., and F. Kelly*, contra, contended that the General Vestry Act was applicable to the case of parish accounts;—that the provisions of the statutes were consistent, for that the previous production of the accounts before the auditors, would enable them to bring to the quarter sessions any objections which they might have to the allowing of the accounts. Sections 35, 36, and 37, of the General Vestry Act, were cited, and it was contended that the trustees were a body having control over the parochial expenditure, and that they raised money upon the parish, and expended

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it for the benefit of the inhabitants. *Rex v. The Inhabitants of East Teignmouth* (a).

*Cur. adv. vult.*

Lord DENMAN, C. J., in the course of the same term, delivered the judgment of the Court as follows:—

In this case the question was, whether accounts kept by the trustees under an act for building a chapel and making a burial ground, were to be produced under the General Vestry Act; that is, whether the trustees were *bound* to produce them. My brother *Parke* granted that rule, after a great deal of hesitation. The question has since been fully argued on both sides, and we have considered it under all its circumstances; and although we think that the act is not well worded, we are of opinion that these *are* accounts of a description which the parish have a right to see. These trustees are a Board constituted by the act, and the moneys to be raised for the purposes mentioned in the act are levied by rates upon the parishioners; and although the trustees have the direction of the expenditure, yet the Vestry, under the *general* act applicable to them, have a right to *inspect* those accounts. We therefore think that *some* means must be discovered for auditing these accounts both before the Sessions and before the Vestry. The rule must therefore be made absolute. I should add, that my brother *Parke*, although he thought at first that it should be otherwise, agrees with the rest of the Court in coming to this conclusion.

Rule absolute.

A mandamus issued to the trustees and their clerk or clerks, which—after reciting information that the auditors

(a) 1 Barn. & Adol. 244.

of the accounts of St. Pancras, appointed and acting under 1 & 2 Will. 4, c. 60, on or about the 11th November then last past, in exercise of the powers given to them by the act, did, by a writing for that purpose, duly sign, summon and require the clerks to the trustees *to come before and attend at a meeting of the auditors of accounts of the said parish, at a certain time and place in the said writing specified*, and to bring with them and produce at such meeting the book or books containing the accounts of all moneys received and paid between Lady-day and Michaelmas-day, 1833, by or on account of the trustees acting under, &c., and then and there to give such information as to the particulars of such accounts as they should be able to give; and that thereupon the said clerks ought to have attended &c., but neglected and refused &c., and still neglect and refuse to attend at any meeting of the said auditors for the purpose aforesaid; in contempt, &c.—commanded the said trustees, acting under and by virtue of &c., and their clerk or clerks, or such of them as should be thereto required, to attend with and produce to the auditors of accounts of the said parish, acting under &c., the book or books containing the account or accounts of all moneys received and of all moneys paid between Lady-day and Michaelmas-day, 1833, by or on account of the said trustees, under and by virtue of &c., *at such time and place or at such times and places as a majority of the said auditors might appoint and give notice thereof to the clerks of the said trustees*, and then and there give such information as to the particulars of such accounts as the trustees and the said clerk or clerks might be able to give, according to the directions of the said act (the Vestry Act),—or shew cause to the contrary thereof.

A return (the particulars of which it is not necessary to state) having been made to this mandamus, and a rule

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nisi to quash the return and to issue a peremptory mandamus, having been obtained, the case was set down in the crown paper for argument.

*Platt*, for the defendants, contended that he had a right to begin, as he had an objection to the mandamus, which he proposed to urge.

The COURT determined that the counsel for the crown was entitled to begin.

*Campbell*, A. G., for the crown, The question for the consideration of the Court is, whether, by the late Vestry Act, the auditors are entitled to inspect all accounts of parochial expenditure, although, by a local statute, another mode of finally auditing those accounts is provided. After the judgment of the Court, given when the rule for this mandamus was made absolute, it cannot be contended that this mandamus does not lie. The return states no new matter, and contains no answer to the writ.

*Platt*, for the defendants. The writ of mandamus is void; first, because it does not appear that the parish of St. Pancras has ever adopted the Vestry Act (a); and secondly, because it does not command the trustees to attend at the place prescribed by the act (b). The place pointed out by the act is the *board-room* of the Vestry. The mandamus requires the trustees to attend "at such time and place as the auditors, or a majority of them may appoint." By sect. 34 of the Vestry Act (c), the

(a) 1 & 2 Will. 4, c. 60.

(b) Several other objections were taken, but the argument respecting them has been omit-

ted, as they were not noticed in the judgment of the Court.

(c) 1 & 2 Will. 4, c. 60.

auditors of accounts are required to meet twice, at least, in each year, at the board-room of the Vestry, and to proceed to audit the accounts for the preceding half-year; and in all parishes in which other Boards have control over any part of the parochial expenditure, the auditors are to have the same power of examining the accounts and officers of such Boards as of examining the accounts and officers of the Vestry, and are to audit the accounts of the Boards in the same manner as they audit the accounts of the Vestry. Sect. 35 empowers the auditors to summon before them any person concerned in the accounts, *at any meeting or adjourned meeting*. The auditors have therefore only power to summon parties to a meeting or adjourned meeting. It does not appear by this mandamus that the defendants were ever summoned to appear at any meeting at the board-room; and by the mandatory part they are required to appear at such *time and place* as the auditors may appoint. *Patteson, J.* The mandamus recites that the trustees were summoned to attend a *meeting* of the auditors of accounts at a certain time and place, specified in a written summons.] From any thing that *appears* on the face of the mandamus, the written summons may have required the trustees to appear at Highgate or at some distant part of the country. The power of the auditors is given by this act; and the trustees cannot be compelled by mandamus to do an act not positively required by the statute.

*Campbell, A. G.*, in reply. [Lord Denman, C. J. We are all satisfied there is nothing in the first objection.] The second objection which has been made, divides itself into two parts; first, that it is not recited in the mandamus that the defendants had been summoned to attend at the board-room of the Vestry; and, secondly,

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that the mandatory part of the writ is wrong, in not requiring the trustees to attend at a meeting *at the board-room*. The provision of the 34th section, which requires the auditors to meet at the board-room, is only *directory*. That section does not say that the acts of the auditors shall be *null and void* if they do not meet at the board-room, nor does it impose any *penalty* upon them in case they do not follow the directions given. Besides, no house is described. The board-room of the Vestry is the room in which, *for the time being*, the Board of the Vestry assemble. It is not intended as a designation of a *distinct building* appropriated to Vestry meetings. The Vestry Act may be adopted by every parish in England:—Could it be contended that the act cannot be carried into effect in any parish unless it contain a particular building, which is called “the Board-room of the Vestry”? Then the 35th section makes no mention of board-room. It merely gives the auditors power to summon persons concerned in the accounts to attend them at any meeting or adjourned meeting. The mandatory part of the writ requires the trustees to appear at such time and place as the auditors may appoint, and give such information as to the particulars of the accounts as the trustees and their clerk may be able to give *according to the directions of the act*. Therefore the attendance of the trustees is only required at such time and place as is in conformity with the provisions of the act. Few writs of mandamus could be considered valid if they are to be criticised so minutely. [Lord Denman, C.J. When you require the trustees to attend at such time and place as you *think proper* to appoint, do you not go further than the act authorizes you?] The trustees are only required to attend at such time and places as are authorized by the act. [Patteson, J. Nothing is said in the mandamus limiting the command to

appear at such time and place as are authorized by the statute.] [Lord Denman, C. J., here read the mandatory words of the mandamus. It is carrying these words, "*according to the directions of the said act*," a great way back, to say that they have the effect of making "times and places" mean times and places prescribed by the act.] Assuming that the writ is faulty in this respect, yet the whole is not therefore a nullity. [Lord Denman, C. J. The very act which this mandamus requires to be done is not within the powers given by the statute. In *Rex v. Leicester* (a) Lord Tenterden said he would *void* the rule, but this mandamus must go *in its terms* or not at all.] The mandamus may be made peremptory as to that which is lawful.

LORD DENMAN, C. J.—This is a very important matter in *principle*, but it seems to me to be quite clear that we cannot make peremptory a mandamus which requires parties to do that which by the law of the land they clearly are not liable to do. By the writ we require them to do a particular act. What is it? To obey the order of the auditors, if they shall call upon them to attend at *any place* and at *any time* which they may appoint. The auditors have no such power. They have only power to require the attendance of the trustees *at the board-room* of the Vestry. The mandamus has issued in such terms, that it is impossible for us, consistently with our duty, to give effect to it. This may be a very considerable inconvenience to the parties, but still we cannot call upon persons to obey a power which they are not bound to obey. I think, therefore, that this mandamus must be quashed.

(a) 7 Dowl. & Ry. 373; 4 Barn. & Cressw. 395; 4 Dowl. & Ry. Mag. Ca. 518.

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LITLEDALE, J.—The act requires the auditors to meet at the board-room of the Vestry. It was contended by the Attorney-General that that was merely *directory*, and that although the board-room of the Vestry might be pointed out by the act as a convenient place, yet the auditors were not restricted to that locality. The provision, in my opinion, is not merely *directory*, and for this reason, that the vestry is the place where by law all parish business ought to be transacted. Where was the vestry? It was in the place designated by law, namely, the board-room, and there the accounts must be audited, unless by the act authority is given to audit them somewhere else. The board-room of the Vestry is the vestry itself; and as the parish accounts ought to be audited at a place which the law has appointed for parish meetings, this provision cannot be considered as *directory*.

This mandamus requires the trustees to meet at such time and place, &c.—(His lordship here read the remaining words of the mandamus.) Even supposing that these words, “according to the directions of the said act,” are to be considered as overriding the whole of the command respecting the auditing of the accounts, and as indicating that in auditing the accounts the parties should proceed according to the provisions of the statute, still you can only make the command good by presuming that the auditors will act upon it, according to the directions of the statute. If the statute has given a particular place where the thing is to be done, you cannot, *according to the statute*, say they are to attend *at such time and place as the auditors may appoint*.

It seems to me that these words, “at such time and place,” &c. override the whole, and if the mandamus is bad as to that part, it is bad as to the whole, because it is *there* that the trustees are to bring their accounts and

ive the information. This mandamus must therefore  
e quashed.

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PATTESON, J.—I am entirely of the same opinion  
on the second objection, though really at first sight it  
ay seem to be a small objection, and one which in  
is case would be of very little importance; yet I am  
raid of the *principle*, because although it is only in one  
ing, yet that thing clearly exceeds the power in the  
t; and if we say that we will nevertheless award a  
remptory mandamus, we are in fact moulding the writ  
mandamus, which we have no right to do. We may  
ould the *rule* for a mandamus, but not the *writ* itself.

WILLIAMS, J. concurred.

Mandamus quashed.

The KING v. Sir OSWALD MOSLEY, Bart., Lord of  
the Manor of Manchester.

A Rule was obtained in last term, calling upon Sir  
*Oswald Mosley*, lord of the manor of Manchester, to  
hew cause why a writ of certiorari should not issue,  
A fine of 300*l.*, for not  
serving an  
office, is ex-  
cessive, where  
the highest  
revious fine was 100*l.*, and was found sufficient to produce an acceptance of the  
office.

So, although since the last refusal the office has become more burthensome, and  
he number of persons qualified to serve has much diminished.

A man may be liable to serve the office of constable in several constablewicks;  
but if chosen constable in two constablewicks for the same year, acceptance of the  
first appointment will excuse his non-acceptance of the second, *semble*.

A person who occupies and is rated for a *warehouse*, and occupies *lodgings*, in  
which he sleeps four or five nights in every week, within the same constablewick, is  
liable to be chosen constable of such constablewick, *semble* (a).

(a) This would be a sufficient *residence* within the Parliamentary Reform Act (2 Will. 4,  
cap. 43, sect. 27,) and a sufficient *inhabitaney* within the Municipal Reform Act (5 & 6  
Will. 4, cap. 76, sect. 9;) but the party would not be thereby qualified as a *householder*, as  
required by the latter statute.

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directed to him, to remove into this Court a certain record of the proceedings in the court-leet of the said manor, relative to the appointment of *Ralph Turner* as one of the constables of the said manor, in the month of October last, or the fines imposed upon him in consequence of his refusal to serve in the said office.

The following facts were stated upon the affidavits in support of and in opposition to the rule :

The juries of the court-leet of the manor of Manchester annually elect the municipal officers of the manor, the principal of whom are the boroughreeve and the two constables. The government of the township of Manchester, (which is co-extensive with the manor,) is vested principally in the two constables. The leet juries have generally elected, as boroughreeve and constables, men of wealth and influence in the town. Persons elected have frequently manifested great reluctance to accept and be sworn into these offices ; considerable expense and great inconvenience and loss of time being the usual consequence of the due execution of the offices. When the certificates commonly called Tyburn Tickets, were transferable by law, parties frequently purchased these certificates at a price varying from 200*l.* to 500*l.*, principally with a view to obtain an exemption from serving the office of constable. In 1808 the leet jury elected *John Drinkwater*, Esq. and *Peter Ewart*, Esq., then being respectively inhabitants of the manor, to be constables of the manor. Mr. *Drinkwater* refused to be sworn in, and was fined 20*l.*, which he paid to the lord of the manor. Mr. *Ewart* also having refused to be sworn in, was fined 100*l.*, and paid that sum ; but of this sum the lord afterwards remitted one half. At the same court-leet the jury elected a Mr. *Potter*, an inhabitant of the manor, to serve the office of constable. He, however, refused to execute the

duties of the office, and was fined 100*l.*, which he paid. Since that time the population of Manchester and the adjoining townships has very greatly increased, and the office of constable has in consequence become more important to the public, and more burthensome to the officer. Many of the dwelling-houses in the chief streets of Manchester, which twenty or twenty-five years ago were inhabited by the wealthy merchants and other individuals, are now used as warehouses &c., and many of such merchants &c., now reside in the neighbouring townships, and are thereby become liable to serve the office of constable in such townships, although accustomed daily to frequent their warehouses &c. in Manchester. At a court-leet for the manor of Manchester, held 6th October, 1834, the jurors returned *Ralph Turner*, merchant, as a fit and proper person to be one of the constables of the manor for the ensuing year; and *Mr. Turner* was afterwards summoned to the court, attended, and was required to take upon himself the office of constable, and to take the oaths for the due execution of the office. This, however, he refused to do; and the steward, in consequence, imposed upon him a fine of 300*l.* The ground of the refusal of *Mr. Turner* to accept the office was a belief, founded on the following circumstances, that he was not liable to serve the office:—*Mr. Turner* has resided for many years with his mother, at Carter Place, near Haslingden, distant from Manchester about seventeen miles. He has there in some respects a separate establishment, for which he pays rates and taxes. He and his brother jointly rent of their mother the farms and lands belonging to Carter Place, and have a large manufacturing establishment in the township of Haslingden, where also they occupy a considerable farm, of which they are joint proprietors. For property occupied by them in Has-

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lingden they pay a rent of 700*l.* a year, and they are assessed to and pay the rates and taxes in respect of all the property occupied by them in Haslingden. Mr. *Ralph Turner* and his brother are subject to, and actually do perform suit and service at the court-leet of Haslingden, in respect of the property so occupied by them in that township; and when from any cause they have not attended at such leet, a fine has been imposed on them, and paid. The brothers jointly occupy a warehouse in Manchester, at which they sell the goods manufactured by them at Haslingden; which warehouse is open every day for that purpose, and for which they are rated and pay rates. Mr. *Ralph Turner* is in the habit of coming into Manchester from Haslingden every Monday afternoon or Tuesday morning, and of remaining there till the Saturday afternoon, for the purpose of attending to his business. He does not however, nor does any person, sleep at the warehouse, nor has he any servant in Manchester, or establishment there other than the warehouse; but he occupies lodgings at a weekly rent, and there sleeps when in Manchester. It appeared upon the affidavit of Mr. *Turner*, that he objected to the proceedings of the court-leet on two grounds; first, that he was *not liable* to be elected; and secondly, that even if he were so, the *fine was excessive*. The deputy steward, in an affidavit sworn *contra*, stated his belief, that unless a considerable fine is imposed upon fit persons who, being elected, refuse to serve the office of constable, much difficulty will occur in procuring the services of fit and proper persons actually resident within the town, and that many fit persons would rather pay a considerable sum of money, by way of fine, than undergo the labour and inconvenience attendant upon a due execution of the office.

Sir *F. Pollock* and *Wightman* now shewed cause.

On neither of the two grounds suggested ought this rule to be made absolute.

The circumstance of Mr. *Turner's* being liable, supposing that to be the fact, to suit and service in the township of Haslingden, does not exempt him from liability to be elected constable of Manchester. If the fact of being *liable* to be elected constable elsewhere were a sufficient excuse, a party liable to be appointed by the courts-leet of two manors might refuse to serve in *either* manor. It may be denied that Mr. *Turner* is a resiant in Haslingden, but it cannot be denied that he is so in Manchester. In *Rex v. Adlard* (a), in which all the authorities are collected, and which will be relied on *contrà*, it was held, that a person who lived in the parish of A., and occupied for the purposes of his trade premises in the parish of B., for which he was rated and paid the rates, but in which neither he nor any one ever slept, was not liable to serve the office of constable in B. This case is very different; for here the party does in general sleep five nights a-week in Manchester.

Then with regard to the amount of the fine, it is submitted, that under the circumstances it was not greater than those circumstances rendered necessary. Nearly thirty years ago, a fine of 100*l.* was found inadequate, and such a change of circumstances has since taken place as makes it reasonable to suppose that a fine of 300*l.* is not more than sufficient for the purpose of securing, at the present day, the services of proper persons.

*Campbell*, A. G. and *Colquhoun*, *contrà*. It is quite clear that Mr. *Turner* is a resiant at Haslingden, (distant seventeen miles from Manchester). It is impossible for

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First point:  
Liability to  
serve the  
office.Second point:  
Amount of  
fine.

First point.

(a) 7 Dowl. & Ryl. 340; 4 Barn. & Cressw. 772; 8 Dowl. & Ryl. Mag. Ca. 416.

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him to perform the duties of constable both there and at Manchester. If the Court decide that Mr. *Turner* is liable to serve the office of constable in both places, they will in effect say that he is liable to be *punished* in each place for not performing duties which his circumstances disable him from performing. A man can be constable in one constablewick only; and therefore if Mr. *Turner* is shewn to be liable to serve in Haslingden, he is exempt in Manchester. In Haslingden, Mr. *Turner* occupies buildings and lands, and has an establishment for residence, in respect of which he is rated. In Manchester he has no dwelling-house for which he is rated—no establishment of any kind. In *Rex v. Adlard*, the defendant occupied and was rated for premises in the parish in which he was elected constable, and occasionally passed the night at work in those premises, yet he was held not to be liable. In that case, Lord *Tenterden* observed, that it was not material whether the defendant passed the night *at work* or *asleep* (a). That case was decided on the ground that if a party was not a rated inhabitant within the constablewick, he was not liable to serve the office of constable. If Mr. *Turner* were in the habit of sleeping *every* night at *lodgings* at Manchester, he would not be a rated inhabitant. [*Littledale, J.* In *Cook v. Stubbs* (b) it was said that the rule is, that every man ought to be within a leet, and none can be of two leets. Suppose Mr. *Turner* had a dwelling-house and establishment at Manchester, and also at Haslingden, what then?] A difficulty would arise, which does not occur in the present case. [*Littledale, J.* Suppose he had a house at Haslingden, and that he slept every night at Manchester

(a) This does not appear in either of the reports of this case, but was stated by the Attorney-General, from his own recollection.  
 (b) Cro. Jac. 583.

in lodgings, would he not then be liable? He would be liable to be summoned to the court-leet.] As a *resiant* he might be summoned to the leet, but he would not be "*idoneus*" to serve the office of constable. It is very important that a constable should be a householder, in order that he may be readily found in case of a sudden affray.

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Every fine ought to be reasonable. *Com. Dig. Leet*, Second point. (M. 5). A fine of 40*l.* is the highest anywhere to be found in the books. In this same manor a fine of 100*l.* was imposed in 1808, and appears to have been sufficient, as no fines from that time until now are stated to have been imposed for refusing to serve this office. No ground has been made for raising the fine at once to three times the amount of that last imposed. In the case mentioned as having occurred in 1808, there would appear to have been actual *contumacy*, as the parties do not seem to have disputed their *liability*. Here, no contumacy is imputed, but on the contrary, a *bonâ fide* doubt of his liability appears to have been the motive for Mr. *Turner's* refusal to serve the office.

LORD DENMAN, C.J.— I think that this rule must be made absolute; not that I entertain any great doubt as to whether Mr. *Turner* is a *resiant*, so as to be liable to be called upon to serve this office, (though the point may certainly be open to doubt,) but because I think that the fine is clearly unreasonable. As 100*l.* was found to be a sufficient fine twenty-seven years ago, there is no reason why a fine of triple the amount should be imposed now. The *Court* are to adjudge whether a fine is reasonable; and it is impossible not to look with considerable jealousy at these fines, when we consider by whom they are received.

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LITLEDALE, J.—I think that Mr. Turner is a resident within the jurisdiction of the court-leet of Manchester. I do not think he could exempt himself from serving the office of constable by living in a *lodging*. He is one whose *situation* in life makes him a proper person to be elected to this office. Perhaps if Mr. Turner had been actually chosen constable of Haslingden for the same year, he might have been discharged from being constable of Manchester. For in *Vin. Abr. tit. Constable*, (C.) pl. 8 (a), I find this passage: “A. was actually constable of the hundred of B., and lived at W. within the hundred of B., in Essex, and being chosen collector for the poor in Cornhill, in London, where he first lived, a writ of privilege was moved for and granted, 3 Keb. 627, pl. 16, *Rex v. Rice*,” and in the margin this is added, “2 Ja. 46, *Price’s case*, S. C.; and he was discharged till his office of constableness should expire.” But the fine is, I think, unreasonable. The largest fine ever before imposed was 100*l*. It is said to be difficult to get efficient persons to serve the office. This is very probable; for there is no corporation, and the government of the township is vested principally in the two constables, whose duties are burthensome. Still I think that a fine of 300*l*. is excessive. A smaller fine must first be tried, and if it is found to be insufficient, the fine may be increased, until perhaps it reaches the present amount.

PATTESON, J.—On the ground that the fine is excessive, I think that this rule should be made absolute. I wish it to be understood that the rule is not made absolute on the ground of non-liability. At the same time I confess, that, as at present advised, I see no reason why a man should not be *liable* to serve in several leets.

(a) 5 Vin. Abr. 432.

If he had been already *chosen* constable for the ensuing year in one place, that might be an excuse for not serving in the other for the same year, for a man cannot duly serve that office in two places at the same time.

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WILLIAMS, J. concurred.

Rule absolute.

WILES v. COOPER and others.

TRESPASS for assault and false imprisonment. The provisions of 5 Geo. 4, c. 18, apply only to cases of penalties and forfeitures.

Plea: not guilty.

By an order of *Patteson*, J., made by consent, the following case was stated for the opinion of the Court:

The plaintiff is a carpenter, living at Cheltenham. The defendants were at the time of the imprisonment, and still are, justices of the peace for Gloucestershire.

1st May, 1834, one *Willicombe* made an information and complaint in writing, upon oath, against the plaintiff, before the defendant *Cooper*; the material part of which was as follows:—"who saith that there is due to him from *Charles Wiles*, (the plaintiff,) *for wages for labour as a carpenter*, the sum of 2*l.* 2*s.* 8*d.*, which he has neglected to pay."

In consequence of the above complaint, the plaintiff was summoned to appear and answer before the justices who might be sitting at the Public Office, Cheltenham, on 3d May then instant, which was the next day of petty sessions. The plaintiff appeared, in obedience to the summons, before the three defendants, who then were the sitting magistrates. *Willicombe* also appeared, and in one of the occupations therein specified, existed between the debtor and the informant.

Therefore magistrates have no power, under that statute, to commit a party to prison for the non-payment of a sum of money adjudged by them, under 20 Geo. 2, c. 19, 31 Geo. 2, c. 11, and 4 Geo. 4, c. 34, to be due as wages.

In an information before magistrates, under 20 Geo. 2, c. 19, 31 Geo. 2, c. 11, and 4 Geo. 4, c. 34, for non-pay-

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in the presence of the plaintiff and before the defendants made a statement upon oath, of which the following minute was made by the magistrates' clerk:—"Aaron Willicombe, sworn, saith—There is due to me from Charles Wiles 2l. 2s. 8d. for wages as a journeyman carpenter at 14s. a week." The defendants then heard the statement of the plaintiff in answer to Willicombe's complaint, which did not satisfy them that the wages were not due. The defendants therefore ordered and adjudged the plaintiff forthwith to pay 2l. 2s. 8d. together with 4s. 6d. costs. The plaintiff then stated that he could not pay those sums, and that he had not sufficient goods or chattels whereon the same could be levied by distress. Whereupon the defendants committed the plaintiff to prison for two calendar months, unless the said sums of 2l. 2s. 8d. and 4s. 6d. should be sooner paid.

By the warrant of commitment,—after reciting that Willicombe had complained that the plaintiff had refused or neglected to pay unto him the sum of 2l. 2s. 8d., the wages justly due to him from the plaintiff for work and labour as a servant in the business of a carpenter, duly performed by Willicombe for the plaintiff; that a summons had been issued, and that the plaintiff had appeared, but did not prove to them, the defendants, that the wages had been paid to Willicombe, and did not shew any just cause why the same should not be paid; that they, the defendants, had therefore, on 3d May, by writing under their hands, *adjudged*, determined and ordered that the plaintiff should pay forthwith to A. Willicombe 2l. 2s. 8d., which appeared to the said justices to be just and reasonable to be paid by the plaintiff to Willicombe, and 4s. 6d. for costs, together 2l. 7s. 2d.; that on 3d May the plaintiff had due notice &c. but neglected and refused to pay the same; and that it appeared to them, the justices, by the confession of the

plaintiff, that he had not sufficient &c., whereon to levy &c., and that he had not paid the said sums or any part hereof;—it was, in pursuance of 5 *Geo.* 4, c. 18, commanded to the constable of Cheltenham, *to take the plaintiff*, and safely convey him to the House of Correction at Northleach, and deliver him to the keeper thereof; and to the keeper thereof to receive him into the said House of Correction, there to imprison him for two calendar months, unless the said sum of 2*l.* 7*s.* 2*d.* should be sooner paid, or until he should be discharged by due course of law.

The plaintiff remained in prison eight days, and then paid the money and was discharged.

The questions for the opinion of the Court are, First, Whether the defendants were empowered, by 20 *Geo.* 2, c. 19, and 4 *Geo.* 4, c. 34, to order and adjudge the plaintiff to pay the said sums of 2*l.* 2*s.* 8*d.* and 4*s.* 6*d.* in manner before mentioned: Secondly, Whether, upon non-payment and confession by the plaintiff that he had not sufficient, &c. whereon the same might be levied, the defendants were empowered, by 5 *Geo.* 4, c. 18, to commit him to prison, as above stated.

If the Court shall be of opinion in the affirmative thereof, then the plaintiff agrees that a judgment shall be entered against him by *nolle prosequi* or otherwise, as the Court may think fit; but if the Court shall be of a contrary opinion, then the defendants agree that judgment shall be entered against them by confession, for 5*l.* damages, or otherwise, as the Court may think fit.

*Erle*, for the plaintiff. The magistrates had no power, either by 20 *Geo.* 2, c. 19, or 4 *Geo.* 4, c. 34, to order the plaintiff to pay this sum of money. By 20 *Geo.* 2, c. 19, it is enacted, that disputes which shall arise between masters and servants in husbandry, who

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First point:  
Authority of  
magistrates to  
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shall be hired for one year or longer, or which shall arise between masters and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other labourers, shall be heard and determined by a justice of the peace; and the justice is empowered to make an order for the payment of the wages, and in case of non-payment for twenty-one days, to levy the amount by distress and sale. By 4 Geo. 4, c. 34, s. 5, the justice is empowered to order payment of the amount of the wages which shall appear to be due to any servants in husbandry, artificers, labourers, or other person named in 20 Geo. 2, c. 19, or in 31 Geo. 2, c. 11, which was passed to empower justices to determine differences between masters and their servants in husbandry, though such servants should have been hired for less time than a year. It was also declared, by 4 Geo. 4, c. 34, that the order of justices for the payment of the wages should be final.

Sufficiency of  
information.

First. It does not appear in the *information* upon which the adjudication was founded that the complainant was one of the class of persons named in the acts of 20 Geo. 2 and 4 Geo. 4.

Relation of  
master and  
servant.

Secondly. It does not appear upon the information, nor indeed by the evidence subsequently given, that the relation of master and servant existed between the complainant and the plaintiff. In all the cases on this subject, it has been held that the relation of master and servant must exist, and that otherwise the magistrates have no jurisdiction. *Hardy v. Ryle* (a), *Lancaster v. Greaves* (b), *Bramwell v. Penneck* (c).

Second point:  
Authority to  
commit.

The magistrates had no authority to *commit* the party for non-payment of the sum adjudged to be due. This

(a) 4 Mann. & Ryl. 295; S. C.  
9 Barn. & Cressw. 608; 2 Mann.  
& Ryl. Mag. Ca. 801.  
(b) 9 Barn. & Cressw. 628.

(c) 1 Mann. & Ryl. 409; S. C.  
7 Barn. & Cressw. 536; 1 Mann.  
& Ryl. Mag. Ca. 109.


ion arises on the 5 Geo. 4, c. 18 (a), which is intit-  
 "An act for the more effectual recovery of *penal-*  
 before justices and magistrates on conviction of

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Sect. 1. "Whenever any  
 , or forfeiture is or shall  
 acted to be recovered be-  
 ny justice or justices of  
 ace, or magistrate or ma-  
 es for any county, &c.,  
 ch justices, &c. is or are  
 ized and empowered, on  
 nviction of the offender, in  
 t of payment of such pe-  
 or forfeiture, together with  
 asonable costs and charges  
 ling such conviction, to  
 the same to be levied by  
 is and sale of the goods  
 attels of the offender or  
 ers, by warrant or warrants  
 the hand and seal, or  
 and seals, of such justices,  
 ogether with the reasona-  
 ets of such distress and  
 and in case, upon a valua-  
 eeing taken of the goods,  
 f the offender, sufficient  
 is for the payment of all  
 penalties and forfeitures  
 ther costs and charges,  
 t be found, or in case it  
 ppear to such justice, &c.  
 by the confession of the  
 er or otherwise, that the  
 er has not sufficient goods,  
 hereupon the same may  
 ied, within the jurisdiction  
 h justice, &c., no sale shall  
 place of the goods, &c. of  
 offender, but it shall be law-  
 such justice, &c. to commit  
 offender to the common  
 or house of correction for

such time and in such manner  
 as in such acts respectively men-  
 tioned and directed, then and in  
 every such case it shall and may  
 be lawful to and for such jus-  
 tice, &c., at his or their discre-  
 tion, to order the offender so  
 convicted to be kept and de-  
 tained in safe custody until re-  
 turn shall be made to such war-  
 rant or warrants of distress, un-  
 less, &c.; or in case it shall ap-  
 pear to the satisfaction of such  
 justice, &c. either by the confes-  
 sion of the offender or otherwise,  
 that he or she hath not goods,  
 &c. within the jurisdiction of  
 such justice, &c. sufficient where-  
 on to levy all such penalties and  
 forfeitures, costs and charges, such  
 justice, &c. may, at his or their  
 discretion, without issuing any  
 warrant of distress, commit the  
 offender for such period of time  
 and in such and the like manner  
 as if a warrant of distress had  
 been issued and a nulla bona re-  
 turned thereon."

Sect. 2, after reciting that by  
 some acts certain *penalties or*  
*sums of money* are to be recovered  
 before a justice or justices of  
 the peace, or a magistrate or  
 magistrates, and he or they is or  
 are authorized to issue forth his  
 or their warrant for levying *such*  
*penalties or sums of money* by dis-  
 tress and sale of the goods, &c.  
 of the offender or defendant,—  
 but no further remedy is pro-

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offenders, and for facilitating the execution of warrants by constables." Upon examination, it will be found that this statute applies only to *penalties* and *forfeitures*, and has no relation to *wages*. *Hutchinson v. Lowndes* (a) may be quoted *contra*; but all that the Court decided in that case was, that a warrant of commitment must be *in writing*. There was no discussion upon the question whether the magistrates had the *power* to commit.

First point.

*R. V. Richards*, for the defendants. The magistrates had authority under 20 *Geo.* 2, c. 19, and 4 *Geo.* 4, c. 34, to determine this matter. By those statutes, the magistrates are authorized to determine disputes between masters and servants in husbandry, and between masters and certain artificers. It was proved that the complainant was entitled to wages at 14s. a week, as a

vided in case no sufficient goods, &c. can be found whereon to levy such penalties or sums of money, — for remedy thereof enacts, "that whenever it shall appear to any such justice, &c. by whom any penalty or sum of money is adjudged to be paid, upon the return of any such warrant of distress, that no sufficient goods, &c. of the offender or defendant can be found, whereon to levy the sum adjudged to be paid, and all costs and charges within the jurisdiction of such justice, &c., or in case it shall appear to such justice, &c., either by the confession of the party or otherwise, that he or she has not sufficient goods, &c. within the jurisdiction of such justice, &c., sufficient whereon to levy such sum of money,

costs and charges, such justice, &c., at his or their discretion, and without issuing any warrant of distress, may proceed in such and the like manner as if a warrant of distress had been issued, and a nulla bona returned thereon; and it shall be lawful for such justice, &c. to issue forth his or their warrant for committing such offender or defendant to the common gaol, for any term not exceeding three calendar months, unless the sum adjudged to be paid and all costs and charges of the proceedings shall be sooner paid: Provided always, that the amount of such costs and expenses shall be specified in such warrant of commitment."

(a) *Ante*, vol. i. 476.

journeyman carpenter. [Lord Denman, C. J. Was any contract to serve shewn?] If a man be hired at 14s. a week, the common understanding is that he is to become the *servant* of the person who hires him, for a week at least, for 14s. [Littledale, J. The information does not call the complainant a journeyman carpenter, and it is the *information* which gives the magistrates jurisdiction.] It was *proved* that the complainant was a journeyman carpenter; and there is nothing in the statutes to limit the power of the justices to such cases only, in which the information expressly shews that the case is within the jurisdiction of the justices.

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If the magistrates had jurisdiction, *Hutchinson v. Lowndes* is an authority to shew that they had power to commit under the 5 Geo. 4, c. 18. The power of adjudication would be nugatory if there were no power to commit. It could not be the intention of the legislature that if the party refused to obey the order of the magistrates, and had no goods to be distrained, the complainant's only remedy should be by *indictment*.

LORD DENMAN, C. J.—*Hutchinson v. Lowndes* was only argued on one side. The Court were satisfied that one objection was fatal, and decided nothing with respect to the power to commit. The statute of 5 Geo. 4 applies only to *penalties*, and not to a case like the present, where a sum of money is adjudged to be *due for wages*.

LITTEDALE, J.—It is quite clear that the statute of 5 Geo. 4 applies only to penalties and forfeitures.

To give the magistrates jurisdiction under 20 Geo. 2 and 4 Geo. 4, it should appear that the relation of master and servant existed. The *information* merely says that a sum of money is due from *Wiles* to the com-

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plainant *for wages as a carpenter*. The *evidence* is, that a sum of money is due from *Wiles* to the complainant *for wages as a journeyman carpenter at 14s. a week*. Two new facts are therefore added; that the complainant is a journeyman carpenter, and that he was engaged at 14s. a week. The *warrant* goes so far as to state that a sum of money was due from *Wiles* to the complainant for wages due to him for work and labour *as a servant* in the business of a carpenter.

PATTESON, J.—The magistrates had no power, under the statute of 5 *Geo. 4*, to commit. It was *assumed*, in *Hutchinson v. Lowndes*, by the counsel who moved for the rule for a new trial, that such a power was given by that statute; but there was no *decision* to that effect by the Court.

WILLIAMS, J., concurred.

Judgment for the plaintiff.

—◆—

REX v. The Justices of the County of CARNARVON.

Where, in an affidavit to found a motion, the addition of a deponent is omitted, the Court will not inquire whether the facts sworn to by a co-deponent are sufficient to support the application.

A Bastard child, born on the 13th November, 1834, became chargeable to the parish of Llanfihangel-y-Pennant three weeks after birth. An order under 4 and 5 *W. 4*, c. 76, s. 72, on one *Williams*, as the putative

When a bastard child becomes chargeable a month before the Epiphany sessions, an application for an order to charge the putative father is not too late at the Easter sessions; *semble*.

The sessions cannot entertain an application, by the overseers of a parish, for an order to charge the putative father of a bastard child, without direct proof of notice to such putative father, notwithstanding his *appearance* in Court.

father, was applied for at the Carnarvonshire Easter sessions, 1835, by the overseers of that parish. The justices considered that the application ought to have been made at the Epiphany sessions, and was now too late, and refused to make the order.

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*Archbold*, in Easter term last, moved for a rule for a mandamus to the justices to hear the application, and contended that the words (in s. 72) "may apply to the next General Quarter Sessions" were *directory* only, and did not preclude the overseers from applying at any subsequent sessions; that if the limited construction given by the sessions to these words were to be adopted, the enactment would in many cases be ineffective, as the overseers might often be unable to procure sufficient evidence to substantiate the charge against the putative father until after the first sessions; that sect. 73, by providing that in case an order be made against the putative father, the maintenance of the child shall be calculated from its birth, if that shall have taken place within six months previously, but if the birth shall have taken place more than six months previously, the maintenance shall be charged for six months only,—plainly indicates that the legislature contemplated that an application under sect. 72 might be made after the child had been *chargeable* more than six months.

The Court granted the rule nisi.

In the affidavit upon which the rule was obtained, the petitioners were described as "*Owen Jones*, of Wanpeny Clogwyn, and *Owen Evans*, of Dewmbach, late overseers of the poor of the parish of *Llanfihangel-y-Pennant*, in the county of Carnarvon, and *Robert Williams*, of Carnarvon, in the said county, attorney at law."

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*J. Jervis*, on shewing cause, objected that the affidavits could not be read, on the ground that they did not contain the proper additions of the deponents, *Jones* and *Evans*, pursuant to Reg. H. T. 2 Will. 4, No. 5, which directs that "the addition (*a*) of every person making an affidavit shall be inserted therein."

*Archbold*, contra, urged that *Robert Williams* was properly described, and that enough of the matters in the affidavit were deposed to by him to enable the Court to decide the question intended to be raised.

LORD DENMAN, C.J.—The affidavit is not in the form required by the rule of court. We cannot go through it to see how much *Robert Williams* has deposed to.

*Per Curiam.*

Rule discharged (*b*).

The affidavit having been amended and re-sworn, the Court granted a second rule.

*J. Jervis* in this term showed cause upon an affidavit, which stated, that upon the hearing of the case at the sessions, the overseers being called upon to prove their notice of application, put in a paper purporting to be a notice or a copy of a notice to *Williams*, but not signed. There had been no notice to produce any original notice. It was objected that this evidence was insufficient; but the sessions overruled the objection.


He was stopped by the Court.

*Archbold*, contra, contended that the party must, by his appearing in pursuance of the notice, be considered

(*a*) *Vide* 2 Inst. 665.

(*b*) And see *Lawson's* case, 3 Tyrwhitt, 489.

as having *waived* any right to object that the notice was insufficient; that the paper which was put in was a mere *copy* of the notice; and that it lay upon the party, defendant, to produce the real notice, and shew that it was insufficient.

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Lord DENMAN, C. J.—It is quite clear that the notice was insufficient. The objection was taken, and was never waived. We cannot enter into the other question.

*Et per Curiam.*

Rule discharged, without costs.

—◆—  
 The KING v. RAMSDEN and others.

IN Easter term a rule had been obtained, calling upon Mr. Ramsden, and several other gentlemen, to shew cause why an information in the nature of a *quo warranto* should not be exhibited against them, to shew by what authority they respectively claimed to exercise the office of governor and director of the poor of that part of the parish of St. Andrew, Holborn, which lies above Bars, in the county of Middlesex, and St. George the

By a local act, the inhabitants of an incorporated district are directed to elect governors and directors of the poor,—who are authorized to make orders and regulations respecting the poor and the poor-rates,—are to make out a list of sixteen inhabitants or occupiers, from which list justices at a petty session are to elect four to be overseers of the poor,—are empowered to appoint watchmen and beadle, (who are to be sworn in as constables, and act as such whilst in execution of the powers of this act, and who, together with the constables duly appointed, are to be under the direction and control of the governors and directors,) clerks, collectors, treasurers, inspectors, assistant overseers, and all such other officers as they may think fit,—to dismiss them, and pay them such salaries as they may think proper,—are to ascertain and settle the sum to be assessed for parochial purposes, (for which sum poor-rates are to be made by the inhabitants,)—are to have vested in them all houses &c. used for the accommodation of the poor, and of the watchmen and beadle, and all other property purchased for those purposes, and are to sue and be sued, and to prosecute by indictment or information.

Held, that the office of governor and director is not such an office that an information in the nature of a *quo warranto* will lie for an usurpation of it.

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Martyr, in the same county,—on the ground that their elections were invalid, not being in accordance with the provisions of 6 *Geo. 4*, c. clxxv (a).

By this statute it is enacted, sect. 5, that on 25th March in each year, the rated inhabitants within the above district should elect twenty-five gentlemen and twenty-five tradesmen, who, with certain official persons, were constituted the governors and directors of the poor of the district for the ensuing year, with power to make orders and rules for the government, relief &c. of the poor, and for the ascertaining, charging, collecting, managing, and regulating of the poor-rate, and for the appointment of watchmen and beadles, and for the regulation of the constables.

By sect. 8 it is enacted, that the governors &c. shall, on the Wednesday next after their election, meet together and make out a list of sixteen inhabitants or occupiers, of whom justices at a petty session are to appoint four, to be overseers of the poor of the district for the ensuing year.

By sect. 10, all the messuages &c. occupied or used for the accommodation of the poor, and the watchmen and beadles of the district, and all moneys and rates, fixtures, furniture, &c. were vested in the governors &c., who were thereby empowered to bring and to defend suits or actions, and to prefer indictments or lay informations, laying the property as the property of the governors and directors.

By sect. 12, the governors &c. are to meet in August and in February, or oftener if necessary, to ascertain and settle the amounts to be assessed for the relief of the poor, and for defraying the expenses of the watch and beadles.

(a) Repealing 39 *Geo. 3*, c. xli.

3, the inhabitants and occupiers present at to be held for that purpose, within twenty e several sums of money shall have been so as aforesaid, are directed to make two dis- ne to be applied towards the relief of the e other towards defraying the expenses of id beadles.

12, the governors &c. are authorized to ap- men and beadles, who are to be sworn in as und to act as such whilst in the execution of and who, together with the constables, duly re to be under the direction of the gover-

16, the governors &c. are empowered to re- nt, purchase, or erect watch-houses.

18, the governors &c. are authorized to ap- remove a clerk, collectors, a treasurer, over- nspectors, and other officers and servants, them such salaries as they shall think

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Pollock, Merewether, Serjt., Thesiger, and v shewed cause. A quo warranto will not case. It is a high prerogative writ, which where the *crown* is interested. In this case franchise under the crown has been invaded. ors &c. in this case, have only such duties to are usually discharged by the churchwardens rs; and it was determined in *Rex v. Dan-* | *Rex v. Shepherd(b)*, that no quo warranto office of churchwarden. Nor are the parties medy; for the validity of the election of the

2 Stra. 1196; S. C. 1 Bott, 288, pl. 326.

4 T. R. 331.

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governors &c. may be tried in an action of trespass, property being vested in them by the act. There is no case similar to this. In *Rex v. The Corporation of the Bedford Level* (a), it was held, that a quo warranto information did not lie for the office of registrar, an officer whose duty it was to register the titles to land within the Level, and who was bound to take an oath of office. [*Palleson, J.* That decision proceeded on the ground that the registrar was the *servant of the corporation*. Here, the question will turn on the nature of the office.] A quo warranto does not lie against the clerk of the commissioners of land-tax; *Rex v. Thatcher* (b). In one case (c) it was held to apply to the office of steward of a court-leet, but not to that of steward of a court-baron; the former being a court of record, which the latter is not. In *Rex v. Highmore* (d) it was held, that a quo warranto would lie for exercising the office of *bailiff* in a borough which was not a corporate town. But there the bailiff was the *returning officer*. *Rex v. M'Kay* (e) is open to the same observation. Formerly, where a private right was in question, and a franchise had been usurped, the practice was to refer the matter to the Attorney-General, who might file an information. The rule now is, that the Court will not grant an information unless the *public* are interested. In this case there is no encroachment on the crown, and the public at large are *not* interested. The office is created by statute, and the operation of that statute is confined to the limited district. [*Patteson, J.* In *Rex v. Badcock* (f), in which an information

(a) 6 East, 336; 2 Smith,  
 334.

(b) 1 Dowl. & Ry. 436.

(c) *Rex v. Hudson*, 1 Stra.  
 641.

(d) 5 Barn. & Ald. 771.

(e) 8 Dowl. & Ry. 393; 5  
 Barn. & Cressw. 640; 3 Dowl.  
 & Ry. Mag. Ca. 263.

(f) Cited in 6 East, 359.

was granted, a power was given to the commissioners to impose rates and taxes on the inhabitants. In this case the rates are to be made by the inhabitants, and not by the directors, &c.] They have no power to appoint constables. They have only a power to name watchmen and beadles.

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*Campbell, A. G., Erle, and Jardine*, in support of the rule. It is not contended that a quo warranto lies for the office of churchwarden. That is an *ecclesiastical* office, the right to which may be determined in the ecclesiastical court. The duties which the governors and directors have to perform, are very different and far more extensive than those of churchwardens and overseers. This is manifest upon an examination of the different clauses of the act. By the 5th section, the governors &c. may make orders for the government, relief, maintenance, and employment of the *poor*; for the ascertaining, charging, collecting, managing, and regulating of the *poor-rates*; for the appointment, regulation and management of the *watchmen* and *beadles*; and for the regulation of the *constables*. By sect. 8, the governors &c. are to make out a list of sixteen substantial householders, to be returned to the justices, in order that they may appoint out of that list four persons to be overseers. By sect. 12, they are to *ascertain and settle* the amount of the sums of money which shall be requisite for the maintenance of the poor, and for defraying the expenses of maintaining the nightly watch and beadles. By sect. 13, the inhabitants are to make rates accordingly. The discretion as to raising money is vested in the governors &c., and not in the inhabitants; since the latter are bound to raise such sums of money as the former may think necessary. The governors &c.

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may likewise appoint watchmen and beadles, who are to act as constables, and they are to have control over the constables duly appointed. A quo warranto will lie for the office of bailiff or of constable. [*Patteson, J.* It does not necessarily follow, that because a quo warranto lies for the office of constable, it will lie for the office of the person who appoints the constable. I find an instance to the contrary in *Comyns's Digest* (a), by which it appears that a quo warranto lies for the office of steward of a court-leet of a manor, but not for the ownership of the manor.] In *Rex v. Nicholson and others* (b), an information in the nature of a quo warranto was granted against persons who acted as trustees under a private act of parliament, for enlarging and regulating the port of Whitehaven; and the ground of that decision was, that the office was one in which the public were interested. In this case, the public are much interested in the mode in which the very extensive power and authority entrusted to the governors &c. is exercised. In *Rex v. Badcock*, the Court granted the information, on the ground that the officer had a power to raise money,—which power the governors &c. possess. In no shape could a rule for a *mandamus* be made absolute. To whom could it be directed? [*Patteson, J.* A *mandamus* might be directed to the parish.] It may be admitted that a *quo warranto* is an ancient prerogative writ, and that it issued only where a franchise and authority of the crown had been usurped; but in later times the practice has been to grant an information in the nature of a quo warranto, for the usurpation of a statutory office of a public nature, which this office manifestly is.

*Cur. adv. vult.*

(a) See Com. Dig. tit. Quo Warranto, (A.) (B.)

(b) 1 Stra. 299.

Lord DENMAN, C. J.—This was an application for a quo warranto. The case was argued upon a preliminary objection, namely, whether a quo warranto would lie in a case of this sort. The Court has come to the conclusion that a quo warranto will not lie in a case of this description. It would have been more satisfactory to us to enter at large into the discussion of the case, than to give an opinion on this narrow point alone. The same point was the subject of consideration three or four years ago, in *Rex v. Handley (a)*, when Lord Tenterden, Mr. Justice Taunton, and my brother Patteson, were of opinion that a quo warranto would not lie. Mr. Justice Parke, on the contrary, thought that it would lie. But in consequence of this difference of opinion, no judgment was given at that time. My brothers Littledale and Patteson, before whom, with myself, the question was recently argued, now think that the quo warranto will not lie. I confess that I entertain a good deal of doubt upon the subject, but as the majority of the Court is of that opinion, we think it better that judgment should be given now, than that the public should be put to further inconvenience by further delay.

Rule discharged.

(a) Not reported.

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## BARRONS v. LUSCOMBE and others.

Where magistrates are empowered to settle and allow the accounts of a public officer, and, in case of a neglect or refusal by such officer, for fourteen days after the allowance, to pay over the balance found to be due from him, are directed, upon application of the parties interested, to issue a distress-warrant for such balance,—they cannot after issuing a warrant in conformity with the power given to them, but before execution of it, order that the execution be suspended, on the ground of an error in the settlement of the accounts, unless the parties interested consent to such suspension.

Thus, in the case of a warrant under 50 Geo. 3, c. 49, for the balance adjudged by magistrates to be due from churchwardens and overseers at the expiration of their office.

*Dubatur*, whether the order might not be suspended, on the ground that it had since appeared to the magistrates that there had been no neglect or refusal to pay for fourteen days after the allowance (b).

*Semble*, that if the distress-warrant were a nullity, the magistrates might suspend it. Whether the magistrates have, in ordinary cases, where no party is specially interested in having the execution of the warrant, power to suspend a warrant which they have in due form issued, *quære*.

Where magistrates, without authority, order the suspension of the execution of a distress-warrant duly issued, and the officer afterwards executes such warrant, he is entitled, before action brought for the taking under such warrant, to a demand of a copy and a perusal of the warrant, under 24 Geo. 2, c. 41.

The adjudication of magistrates, under 50 Geo. 3, c. 49, s. 1, upon the accounts of churchwardens and overseers rendered by them at the expiration of their office, is in the nature of an award, and cannot be re-opened by those magistrates for the purpose of correcting a supposed mistake in the settlement of the accounts.

In case of a mistake, an appeal lies to the sessions.

(b) If, as recommended by the Court in *Rex v. Justices of Stafford*, ante, 191, the magistrates summon the party before them previously to the granting of a distress-warrant, this reason for attempting to suspend the execution of the warrant can hardly arise.

**TRESPASS** for taking goods and chattels. Plea: the general issue.

At the trial before *Bosanquet, J.*, at the Devon spring assizes in 1834, the following facts appeared:

The plaintiff, who had been overseer of the parish of —, was called upon by the defendants, who were the succeeding overseers, in pursuance of the 50 Geo. 3, c. 49 (a), to deliver in, and did deliver in an account of

(a) The 50 Geo. 3, c. 49, s. 1, enacts, "That in all cases where any account is required to be made and yielded, and to be signed and attested, by virtue of the 17 Geo. 2, c. 58, every such account shall be submitted, by the churchwardens and overseers, to two or more justices of the peace of the county, dwelling in or near the parish or place to which such account shall relate, at a special sessions for that purpose to be holden within the

oneys received and paid by him. Two magistrates titigated the accounts, and adjudicated that 99l. 13s. due from the plaintiff to the parish, and signed an allowance of the accounts accordingly. The plaintiff acting for fourteen days to pay the sum adjudged to be from him, a distress-warrant was signed and sealed by the two magistrates, directed to the defendants, and put in the hands of the defendant *Luscombe*. Before the distress-warrant was executed, but some days after it had been delivered, a representation was made to the magistrates, that they had made a mistake in their calculation, and the two magistrates, believing they had done so, proposed to the parties that the accounts should be referred to an accountant, and by letter, directed to

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ten days appointed by the court, for delivering in such manner; and such justices are authorized and empowered that they shall so think fit, to come into the matter of every account, and to administer oath or affirmation to such churchwardens and overseers, of the truth of such account, and to allow and strike out of every account all such charges and payments as they shall deem unfounded, and to reduce the same as they shall deem to be excessive, specifying upon, or at the foot of such account, every charge or payment, and its amount, so far as such justices shall disallow or reduce the same, and the cause for which the same was disallowed or reduced; and in case such churchwardens and overseers, or any of them, shall refuse or neglect to do their successors, within

fourteen days from the signing and attesting such account, any sum or sums of money or arrearages, which, on the examination and allowance of such account, in manner aforesaid, shall appear or be found to be due and owing from such churchwardens or overseers, or any of them, or remaining in their hands, the subsequent churchwardens and overseers are authorized, by warrant from any two or more justices of the peace, to levy all such sum and sums of money, by distress and sale of the offender's goods, rendering to the parties the overplus; and in default of such distress, it shall be lawful for any such two justices of the peace to commit the offender or offenders to the common gaol of the county, there to remain, without bail or mainprize, until payment of such sum or sums of money or arrearages as aforesaid."

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*Luscombe*, ordered that the execution of the distress-warrant should be suspended. At the time of writing this letter the magistrates did not sit together, but it was separately signed by them both. Notwithstanding the receipt of this letter, *Luscombe* afterwards, in conjunction with the other defendants, took the goods mentioned in the declaration. No demand had been made of a copy and perusal of the warrant, pursuant to the 24 Geo. 2, c. 44. It was objected on the part of the defendants, that such demand was necessary, as they had acted under a legal warrant, and for this *Price v. Messenger* (a) was cited; and further, that the warrant having once issued could not be revoked or suspended; and that, even assuming that it might be suspended, it had not, under the circumstances of the case, been suspended in a legal manner. The learned judge, without expressing any opinion upon the objections, directed the jury to find a verdict for the plaintiff, and gave the defendants leave to move to set aside the verdict and enter a nonsuit. Verdict for the plaintiff, damages 29*l*. In Easter term, 1834, *Bompas*, Serjt., obtained a rule nisi for a nonsuit; against which,

Plaintiff's  
 first point:  
 Whether dis-  
 tress-warrant  
 properly  
 suspended.

Sir *W. Follett* now shewed cause. If the distress-warrant was properly suspended, no demand of a copy and of a perusal of the warrant was necessary. The question, therefore, for the determination of the Court is this,—whether magistrates, having once signed a warrant, can afterwards legally prevent the execution of it? The proposition to be contended for on the other side is, that a magistrate who signs an illegal warrant, and delivers it to a constable to be executed, is liable for the consequences of that execution, although he expressly desires the constable not to execute it. To establish

(a) 2 Bos. & Pull. 158.

such a doctrine would be highly inconvenient and impolitic. Suppose an information is laid before a magistrate, who, after hearing the evidence, grants a warrant for the apprehension of a supposed felon, but immediately afterwards, being satisfied that the charge was unfounded, rescinds his warrant;—would the constable be justified in executing the warrant, after he has had express notice that it has been rescinded? That case resembles this. Here, the magistrates sign a warrant of distress, revoke it before execution, and give notice of the revocation to the parties to whom it is directed. It will be objected on the other side, that the order of revocation was illegal, since the magistrates did not sit together when they signed it. Whether they were *together* or not is immaterial. They both *agreed* to the revocation of the former order, and that is sufficient. It is idle for the defendants to say that they were acting in *obedience* to the order of the magistrates, when they must have known that they were acting in express *contradiction* to it. [Lord *Denman*, C. J. Is there any authority for saying that magistrates have the power to *suspend* a warrant of this description? Here, the inhabitants of the parish are *interested*. Have they not a right to object to the revocation, and to insist upon the execution of the warrant? *Patteson*, J. In *Rex v. Justices of Norfolk* (a), the magistrates superseded an order of removal which they had made; but that was with the *consent* of the removing parish, who were the parties interested.] Magistrates may supersede any order they have made. [Lord *Denman*, C. J. That is what I want an authority for.] The constable derives his authority solely from the magistrates, and is in fact only their servant. To hold that the magistrates have

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(a) 1 Dowl. & Ry. 69; S. C. 5 Barn. & Alders. 484; 1 Dowl. & Ry. Mag. Ca. 17.

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not power to suspend a warrant would be most mischievous. When a *judge* makes an order for the execution of a prisoner, he frequently suspends it; and the sheriff is bound to obey the order of suspension. The same authority which issues, may, before execution, revoke, a warrant. In this, and in every other court, before actual execution, process may be stayed. In *Nolan's Poor Laws*(a), it is laid down, that "if justices have made an order of removal by surprise, they may issue another, reciting that they were surprised, and suspending the first order, and commanding the parish officers to return it to be cancelled;" and for this two authorities are cited; *Pancras v. Rumbold*(b), and *Rex v. Smith*(c). [*Littledale*, J. There the magistrates acted together.] That is the second point. The question at present under discussion is, whether the magistrates had any right to revoke their warrant. The existence of this power of revocation must be highly conducive to the ends of justice. Suppose information is given to a magistrate, that a party is suspected of having stolen goods in his possession, and he issues a search-warrant: that subsequently other information is given to him, from which it is apparent, that if the search-warrant be executed, the object of the parties will be frustrated:—will not the magistrate be justified in revoking the warrant? Could it be said that the constable might, in that case, execute the search-warrant after he had received notice of its revocation? Every authority, until acted upon, is revocable by the party granting that authority: *e. g.*—The Lord Chancellor, by affixing the great seal, gives authority to commissioners of bankrupts: He has power, under the great seal, to revoke and suspend that authority.

Then it is objected, that the magistrates did not sit

Plaintiff's  
second point:  
Protection of  
officers.

(a) 2 Nod. P. L. 3d ed. 187.—4th ed. 213.

(b) 2 Batt. 624, pl. 638.

(c) 2 Balstr. 343.

gether when they revoked the warrant. That is not a question, since the plaintiff relies on the general proposition, that he who has authority to *issue* process, has power, at any time before execution, to *revoke* that authority; and the officer in whose hands the process is placed, after he has received notice that it is revoked, executes it at his own peril. [Lord *Denman*, C. J. How long is the magistrates' authority to continue? The officer is placed in an unfortunate situation by the act of the magistrates. Might he not be indicted for *not* executing the warrant entrusted to him?] That is the same question. It is submitted, that he would not be subject to an indictment. [Lord *Denman*, C. J. Can the magistrates, by *verbal* notice, get rid of their warrant *under al(a)*?] It is sufficient if the constable has notice not to execute the warrant. The defendants, not acting under the warrant of the magistrate, cannot claim the protection of 24 Geo. 2, c. 44. [*Patteson*, J. If the original warrant was valid, and was not revoked by the subsequent order, the defendants have a right to the protection of the statute.]

*Bompas*, Serjt. and *Crowder*, in support of the rule. The magistrates acted under 50 Geo. 3, c. 49, s. 1. Under the provisions of that section, they ascertained that a sum was due, and issued a distress-warrant to levy on the goods of the plaintiff, the balance ascertained to be in his hands.

It is contended, in the first place, that the warrant being perfectly legal, the magistrates, when they signed it, were *functi officio*, and could not by any subsequent act revoke it; and, secondly, that if the magistrates had such a power of revocation, they did not exercise that

Defendants' first point :  
Justices *functi officio*.

(a) That they cannot, see *Rex v. Bingham*, 3 Younge & Jerv. 101, 1 Crompt. & Jerv. 245, 379, 1 Tyrwh. 46.

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power in a proper and legal way ; and that the defendants were consequently entitled to a demand of a copy and perusal of the warrant, before the present action could be brought. The instances which have been mentioned of the revocation of an authority before execution have no application to the present case. A judge, when he suspends the execution of sentence of death, acts on behalf of the Crown. When a judge suspends a warrant for the apprehension of a prisoner, and in all the other instances put of the revocation of an authority before execution, no third party is interested. In the argument for the plaintiff, the circumstance that a sum of money is *adjudged* to be due from him to the parish is overlooked. A power of appeal is given by the statute in case the magistrates make a mistake ; but unless there have been an appeal, the adjudication is final. Even when the party does appeal, if the warrant issues, he must pay the money. It is not necessary to contend, that if the warrant had not been *legal*, the magistrates, before execution, had no power to revoke it. [Lord Denman, C. J. You admit that if the warrant had been a *nullity*, and the magistrates had told the constable not to execute it, and he afterwards executed it, he would do so at his peril.] That may be so. Here, the magistrates act in a character analogous to that of *arbitrators*, and their adjudication is analogous to an *award*. An arbitrator having published his award, cannot afterwards alter it on the ground that he has made some mistake as to the accounts between the parties. [*Patteson, J.* If the revocation of the warrant would have the effect of *opening the accounts*, I quite agree with you.] If the magistrates could revoke their warrant once, they could revoke it as often as they pleased.

Defendants'  
second point :  
Protection of  
officers.

If persons act *bonâ fide* in the belief that they are acting under a warrant, they will be protected, though they

be mistaken; *Price v. Messenger* (a). These parties believe that they were acting under a valid warrant, they considered the suspension not legal.

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Lord DENMAN, C. J.—The very general ground on which the argument for the plaintiffs was placed, startled me a good deal. I should have thought, that a warrant under the hand and seal of two magistrates would have authorized the officer to execute it, notwithstanding any refusal which he might receive. Here, the warrant was itself perfectly good. If the warrant had been a *nulla* or had issued *without any refusal* on the part of the plaintiff to pay the balance, the magistrates might, perhaps, have authority to revoke it. But that is not the present case. I should say that magistrates are not generally authorized to revoke their warrant after it had been delivered to an officer to be executed. The officer would be placed in a situation of very great difficulty if a magistrate could recall a warrant perfectly good. The question, however, does not arise in the present case, because here a third party, namely, the parish, is interested in insisting upon the execution of the warrant. It is clear, that in the opinion of the magistrates, upon settling of the accounts there was a balance due to the plaintiff. The magistrates come to this decision and subsequently issue their warrant to enforce payment of the money. Both the adjudication and the execution were perfectly legal. The execution of the warrant is ordered to be suspended, because the magistrates entertain doubts whether the accounts were well settled between the parties. The magistrates had no right, in my opinion, to suspend the execution of the warrant on this ground. Nor had the magistrates, acting separately,

(a) 2 Bos. & Pul. 158.

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any more right to suspend the execution of the warrant, than any individual judge has to set aside an order of the Court of which he is a member. The officers were, therefore, in my opinion, justified in acting under this warrant; and it cannot be said that they acted of their own wrong. The defendants were therefore entitled to have a demand of perusal and copy of the warrant made before action brought, under 24 *Geo. 2*, c. 44. If the warrant were wholly invalid, and the magistrates gave notice of nullity to the officer before it was executed, more especially if the party interested had not then required him to execute it, possibly the officer, if sued, would not be entitled to a demand of perusal and copy of the warrant.

LITLEDALE, J.—By 50 *Geo. 3*, c. 49, s. 1, the accounts of the parish officers are to be submitted to two or more justices at a special sessions; and such justices are empowered to examine the accounts, and to disallow and reduce charges; and in case the overseers neglect to pay to their successors, within fourteen days, the sum of money which on the allowance of the account shall be found to be due, the subsequent overseers may, by warrant from any two or more justices, levy such sum by distress and sale of the offender's goods. After the justices have examined the accounts, they are in that respect functi officio. In this case, the accounts were examined and a warrant issued. But it is said, that the execution of the warrant was suspended; and the ground of suspension is suggested to be, that the magistrates had made a mistake in the investigation of the account. They had, in my opinion, no right to alter their award, in respect of the accounts, any more than arbitrators, to whom matters of account are referred, have a right, after

they have published their award, to re-examine the accounts referred to them. If the parties had any reason to be dissatisfied with the settlement of the accounts by the magistrates, they might have appealed to the sessions. Had the magistrates discovered that there had been no refusal by the plaintiff to pay over the sum of money adjudged to be due from him, they might, perhaps, on *that* ground have suspended the execution of the warrant; but they had no right to grant a suspension on the ground that they had made a mistake in settling the accounts.

PATTESON, J.—The doubt which has weighed on my mind during the argument, has been upon the general question, whether a magistrate has power to revoke a legal warrant? I do not mean to say either that he can do so or that he cannot. If the argument for the defendants had gone the length of saying that a magistrate, *in no case*, can revoke a legal warrant, I should have wished for time to consider the question. But the warrant in this case was revoked on the ground that the magistrates had committed a mistake in the settlement of the accounts. This is the only ground suggested for the suspension. In short, the order of revocation is made that the magistrates may re-consider the accounts, which, by the statute, I think, they are not empowered to do. When I look at the evidence, I find that this was the ground of suspension; for I find that, subsequently to the revocation, it was proposed to refer the accounts to arbitration. By the 49 *Geo. 3*, after the justices have examined the accounts at the special sessions, it is enacted, “that it shall and may be lawful for the subsequent churchwardens and overseers, by warrant from any two or more justices of the peace, to levy all such sum

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and sums of money by distress and sale of the offender's goods." The act does not say that the justices who *examined the accounts* and those who are to *grant the warrant*, shall be the *same* persons. The subsequent churchwardens and overseers may go to other justices besides those who examined the accounts, for the distress-warrant. What right then can those justices who examined the accounts have to suspend the execution of the warrant, merely that they may re-examine the accounts?

If the warrant had been suspended on the ground that the magistrates had discovered that there had been no *refusal* on the part of the plaintiff to pay the money adjudged to be due from him, that would have raised the general question, whether a warrant, which has issued *without* authority, can be revoked before execution. On that question I give no opinion at all.

The defendants were, in this case, in my opinion, entitled to a demand of copy and perusal of the warrant.

WILLIAMS, J.—The real question here is, whether the justices can revoke their warrant because they entertain a doubt as to the allowance of the accounts, and are desirous of reinvestigating them. Magistrates have no right to revoke their warrant on that ground; and that being so, the defendants were entitled to the protection of the 24 Geo. 2, c. 44.

Rule absolute.



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## REX v. CURWOOD and others.

**INDICTMENT** against members of a Gas Company, or a nuisance in throwing poisonous matter into the river Thames, and in sinking barges and making erections in the river. The indictment contained twelve counts, charging a variety of nuisances—some in Middlesex, and some in Surrey. The indictment was removed from the Central Criminal Court by certiorari; and *Curwood* obtained a rule,—upon reading the indictment only,—calling upon the prosecutors to give the defendants a note in writing, stating the particular acts of supposed nuisance, upon which they intended to rely at the trial.

The Court ordered the prosecutor of an indictment for a nuisance, to give the defendant a notice of the nuisances intended to be proved.

A rule for this purpose may be granted without affidavit, upon reading the indictment only.

*R. V. Richards* now shewed cause. This is a novel application. The only case of the sort which has occurred, is that of *Rex v. Marquess of Downshire*, now pending in this Court; in which a rule, calling upon the prosecutor to state what roads were indicted, was granted; but there the judge required very strong affidavits, stating that the party could not, by any possibility, ascertain what roads were indicted. Here, however, the rule was granted upon reading the indictment only.

*Curwood*, contra. The principle is perfectly clear, that an indictee should be informed what is the offence with which he is charged, in order that he may have an opportunity of defending himself. Here, it is impossible to say for what the defendants are indicted. Perhaps a motion to quash this indictment for multifariousness might have been supported. No affidavit was necessary, for it is only necessary to read the indictment, to see that the defendants could not know for what acts

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the prosecutors are proceeding. This is no novelty in principle. In Barratry, it is said by *Hawkins* (a), that "it seemeth to be settled practice not to suffer the prosecutor to go on in the trial of an indictment of this kind, without giving the defendant a *note* of the particular matters which he intends to prove against him; for otherwise it will be impossible to prepare a defence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances." The learned counsel added, that, in a case of embezzlement, a similar rule was once obtained by him.

LORD DENMAN, C. J.—We think it reasonable that the defendants should have the information prayed for. The rule should be made absolute.

LITLEDALE, J.—In the case of an action, we should have no doubt upon the propriety of the plaintiff's being called upon to give this note. I see no reason for a different practice in the case of an indictment.

PATTESON, J. and WILLIAMS, J., concurred.

Rule absolute.

(a) 1 Hawk. P. C. c. 81, pl. 13.



## MICHAELMAS TERM,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

## The KING v. The Inhabitants of WOKING.

UPON appeal by "The Proprietors of the River Wey," against a poor-rate of the parish of Woking, Surrey, whereby the proprietors are rated on 325*l.* at the sum of 16*l.* 5*s.*,—upon the ground that they were not liable to be rated, and that, if liable, they were over-rated,—the sessions quashed the rate, subject to the following case :

By 23 *Car.* 2, c. 26, "for preserving and settling the River Wey," the Wey, from Guildford to the Thames, was declared to be a navigable river, and the soil of that portion of the river, and certain parts of the banks, and the locks, sluices, &c., towing-paths, wharfs &c. of the river, vested in trustees, with certain powers for keeping the river navigable; and it was provided, that Lord *Montague*, and his heirs &c., should receive out of the profits of the navigation 2½*d.* for every ton &c. navigated on the river, and that *Thomas Dalmahoy*, and his heirs &c., should receive 4*d.* for every ton &c. navigated on the said river, within his own lands, (situate at Dapdune;


A river navigation company is to contribute to the relief of the poor in a parish through which a portion of the navigable river passes, in proportion to the profit resulting from that portion.

Such profit is to be calculated at the amount of rent which a tenant would pay.

When therefore the company receive the tolls to their own use, the amount of the repairs, and of the expenses necessary to the

carrying on of the undertaking, and also a per centage equal to a reasonable tenant-profit, must be deducted from the gross receipts, in fixing the *ratable* value.

But no deduction is to be made in respect of burthens imposed upon the profits of the navigation, or in respect of compensation payable to the owners of property injured by the navigation.

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in the parish of Stoke-next-Guildford,) besides 20*l.* per annum for a wharf; and that the corporation of Guildford should receive 1*d.* for every ton &c. navigated on the river; and that the trustees should pay to the persons to whom any shares of the profits of the navigation should be allotted, in the manner provided by the act, such respective shares of the net profits of the navigation, after deducting the costs, charges and expenses of repairing &c., and executing the trusts; and that the two chief justices and the chief baron should appoint recompence in money, to be paid out of the profits of the navigation, to persons receiving any damage in their lands &c., by cutting new passages &c.; and that the river should not be used or navigated without the licence of the trustees,—who were authorized to receive certain tolls.


The following tolls have been fixed, and are received by the present trustees:

	<i>s.</i>	<i>d.</i>
Between Guildford Wharf and the Thames . . .	4	0
Between Dapdune Wharf and the Thames . . .	4	0
Between Stoko and the Thames . . .	3	6
Between Bowers and the Thames . . .	3	0
Between Triggs or Send Heath and the Thames . . .	2	6
Between Newark and the Thames . . .	2	0

And so on, according to the distances, with similar rates, decreasing in the same proportion from the Thames to Guildford.

Triggs is in Woking, and Send Heath is in the parish of Ripley, and that part of the navigation which is in Woking extends from a spot between Bowers and Triggs to a spot between Triggs and Newark. If this increased toll is considered to be earned for the use of the navigation, between the points above named, then the sum of 3*d.* per ton is payable in respect of that part of the navigation situate in Woking.

There are no toll-houses on the river, and the tolls are not paid in parts at the different places on the river, but the entire tolls for the whole navigation performed are paid at once, when the vessels are known, generally at the end of each quarter; but if they are strange vessels, at the end of each voyage.

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The whole length of the navigation is 27,060 yards.

The length in Woking is 4049½ yards.

The gross receipts for the tonnage upon the navigation, upon an average of the last three years, are	£.	s.	d.
	5923	16	10

The gross receipts, deducting the receipt for tonnage not passing through Woking, upon an average of the same three years, are	£.	s.	d.
	4705	12	6

The 4705*l.* 12*s.* 6*d.* is made up of receipts in respect of the "through" trade, that is, the tonnage going the whole line of the navigation, and what is called the "short" trade.

The receipts of the "through" trade upon the same average of three years, are	£.	s.	d.
	4311	13	1

The "short" trade passing through Woking	£.	s.	d.
	393	19	5
	<hr/>		
	4705	12	6
	<hr/>		

The share of Woking in the gross receipts for the whole tonnage of the navigation, upon a milage calculation, is	£.	s.	d.
	886	9	11

The share of Woking in the gross receipts for the whole tonnage, deducting the receipts for tonnage, not passing through Woking, upon a milage calculation, is	£.	s.	d.
	688	14	2½

That is to say,

Woking share of the "through"

trade	£.	s.	d.	} 688 14 2½
	630	5	4½	
of the "short" trade,	58	8	9½	

The share of Woking in the tolls, upon a calculation of 3 <i>d.</i> per ton (being half the 6 <i>d.</i> rise for Triggs and Send Heath, according to the scale set forth in the case) for every ton passing Woking, upon an average of three years, is	£.	s.	d.
	309	0	0

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		1226 3 0
	Total expenses . . . . .	<u>£3793 2 4</u>

The compensations are made up as follows:

The Groats to Mr. Dalmahoy . . . . .	450 12 9
The corporation (Guildford) pence . . . . .	214 1 8
Lord Montague's 2½d. . . . .	301 11 1
Mills . . . . .	259 17 6
Total . . . . .	<u>£1226 3 0</u>

The mills are in number three. One only is in Woking, and the annual compensation paid in respect of that particular mill is 65*l.* 6*s.*

The expenses of the navigation in Woking, have been upon an average of years in proportion to the expenses in the other parts of the navigation.

The share of Woking in the whole expenses, exclusive of the compensations, upon a milage calculation, is . . . . .	384 2 10
The share of Woking in the compensations, upon a milage calculation, is . . . . .	183 9 10
Total . . . . .	<u>£567 12 8</u>

The net income of the navigation upon an average of three years, is . . . . . £2230 14 6

£10 per cent. would be a reasonable sum to be deducted for tenant's profits,—leaving 2007*l.* 13*s.* 1*d.*

The share of Woking in the net profits, without any deduction, upon a milage calculation, is . . . . . £333 16 10

The share of Woking in the net profits, after the deduction for tenants' profits, upon a milage calculation, is . . . . . 300 8 10

The questions for the opinion of the Court are—  
1st. Whether the sum in which the appellants are liable to be rated in Woking, is to be ascertained by the *pro-*

*portion* which the *length* of the navigation in Woking bears to the whole length thereof; and if so, what deductions are to be made from that sum. 2dly. Whether the sum in which the appellants are to be rated is to be ascertained by the amount of *tonnage*, on all goods carried through Woking, at the rate of 3*d.* per ton; and if so, what deductions are to be made from that sum.

If the Court shall be of opinion that the sum upon which the appellants are to be rated in Woking, is to be ascertained by the *proportion* which the *length* of the navigation in Woking bears to the whole length thereof, the appellants' claim, from the share of Woking in the gross receipts for the whole tonnage of the navigation, upon a milage calculation (amounting to 886*l.* 9*s.* 11*d.*), to make the following deductions:

1st. The tonnage not passing through Woking, leaving the share of Woking in the gross receipts, after making such deduction, 688*l.* 14*s.* 2½*d.*

2dly. The share of Woking in the general expenses on a milage calculation, exclusive of compensations, (amounting to 384*l.* 2*s.* 10*d.*)—it being found that the expenses incurred in Woking equal its share of the general expenses on a milage calculation.

3dly. The share of Woking in the compensations, on the same calculation, amounting to 183*l.* 9*s.* 10*d.*

These last two sums, deducted from 688*l.* 14*s.* 2½*d.*, (the gross receipts for the tonnage which passes through Woking,) leave a balance of . . . £121 1 6½

4thly. From this sum the appellants claim to deduct 10 per cent. for tenant's profits, amounting to . . . 12 2 0

Leaving, as the sum at which they are

to be rated . . . £108 19 6½

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If the Court shall be of opinion that the gross receipts applicable at Woking, are to be calculated at 3d. per ton, on all goods carried *through* Woking, then the appellants claim, from the sum produced by such calculation, to make the 2d, 3d and 4th deductions, and in such case the deductions will exceed the receipts.

The respondents deny the right of the appellants to make any of the foregoing deductions.

First point:  
 Principle of  
 rating.

*Thesiger, N. R. Clarke, and Montagu Chambers*, in support of the order of sessions. The first question is, what is the *principle* to be adopted in rating the profits of this navigation. The principle laid down in the older cases is, that the tolls of a canal navigation are ratable in that parish only where the voyage is completed and the tolls become due. Thus, in *Rex v. Aire and Calder Navigation Company (a)*, where a navigation passed from A. to B. through several intervening townships, and the tolls were collected for the whole navigation in A. and B., it was held that the assessment might be in A. and B., according to the proportion collected in each. *Rex v. Page (b)* establishes the same principle; which, however, has been broken in upon by the late decisions in *Rex v. Milton (c)*, *Rex v. Palmer (d)*, and *Rex v. The Earl of Portmore (e)*. The principle established by those cases is, that the proprietors of a canal navigation, extending through several parishes, are ratable in respect of the profits of the land used for the navigation in *each* parish. The profits may be ascertained in two modes; first, by the proportion which the *length* of the navigation

(a) 2 T. R. 660.

& Ryl. Mag. Ca. 416.

(b) 4 T. R. 543.

(e) 2 Dowl. & Ryl. 798; S.C.

(c) 3 Barn. & Ald. 112.

1 Barn. & Cressw. 551; 1 Dowl.

(d) 2 Dowl. & Ryl. 793; S.C.

& Ryl. Mag. Ca. 422.

1 Barn. & Cressw. 546; 1 Dowl.

in each particular parish bears to the whole length, on a milage calculation; or, secondly, by the proportion which the earnings for the tonnage of goods in the particular parish bear to those for the goods conveyed throughout the whole line. The question in the present case is, which of these two modes is to be adopted. If the tonnage which is paid can be shewn to coincide with a milage calculation, there can be no objection to the first principle. But where the rate of tonnage varies on different parts of the line of navigation, the principle of a milage calculation is inapplicable, and recourse must be had to the second mode of ascertaining the amount for which the proprietors are ratable in each particular parish. In *Rex v. Kingswinford* (a) it was held, that where a canal passes through several parishes in which the tonnage-dues payable vary, the Company are ratable to the relief of the poor in each parish for the amount of tonnage-dues actually earned there, and not for a part of the *whole* amount carried along the *whole* line of the canal, in proportion to the length of the canal in that parish: and in *Rex v. Lower Mitton* (b), Bayley, J., who delivered the judgment of the Court, said, "The proprietors of a canal or navigation are ratable as occupiers of the land covered with water in the particular parish in which the land lies; and it follows from thence, and was so decided in *Rex v. Kingswinford*, that they are ratable in each parish, in proportion to the profit which that part of the land covered with water, which lies in the parish, produces. If it is more productive than other parts of the canal, either because there is more traffic, or because larger tolls are due upon it, or because the outgoings and expenses there are less, it must be assessed at

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(a) 1 Mann. & Ryl. 20; 7  
 Barn. & Cressw. 236; 1 Mann.  
 & Ryl. Mag. Ca. 43.

(b) 4 Mann. & Ryl. 711; 9  
 Barn. & Cressw. 810; 2 Mann.  
 & Ryl. Mag. Ca. 424.

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a higher proportionate value." In *Rex v. Chaplin* (a), Lord Tenterden recognizes the same principle. This being the established principle when the tonnage varies on the line of navigation, the question is, how far it is applicable to the present case. Here, a four shillings toll is paid for the whole line, and the trustees have apportioned this four shillings, and distributed it over the whole length of the navigation, so that different sums are paid for tonnage on the respective voyages over the different parts of the river. In descending towards the Thames, the tolls on the respective parts of the navigation decrease; in ascending, the tolls increase; so that the rate of four shillings of toll upon the whole navigation is averaged by calculating the tolls which are payable on the upward and downward navigation. In this case therefore the tonnage varies; and the first mode of ascertaining the profits, namely, by a mileage calculation, by taking an average of the tolls earned upon the whole line, would be extremely unjust to Woking. The first mode being therefore inapplicable, the only other mode which can be applied is, that of a rate upon the amount of tonnage which is earned in the particular parish. If this principle be adopted, and the proper deductions are made, it will be found that the proprietors derive no profit from that part of the navigation.

Second point:  
 Deductions.

The next question is, what are the proper deductions to be made out of the receipts? That must depend upon the outgoings and state of the particular portion of the navigation in each parish. The several sums paid amount to 1226*l*. Before the sum for which the proprietors are to be rated can be ascertained, a deduction must be made of all outgoings; and the rate must be made upon such a sum as a tenant would give after a

(a) 1 Barn. & Adol. 926.

tion had been made of all outgoings: *Rex v. Trustees of Duke of Bridgewater* (a), *Rex v. Adames* (b). In respect to the sums for compensation, it is to be held that so much of the receipts as would go to charge them never come into the hands of the proprietors of the navigation. The case, in this respect, resembles *Rex v. Aire and Calder Navigation* (c); and in *Rex v. Liverpool* (d) it was held that the Company were liable as to compensation of this description. It appears that the sums expended in repairs must be deducted; *Rex v. Oxford Canal Company* (e). [*Cambridge & A. G.*, admitted this.] Then the only remaining question is, whether a sum equivalent to a tenant's profit ought not also to be deducted. It is clear from *Rex v. Midland* (f), and *Rex v. Trustees of Duke of Bridgewater*, that such a deduction ought to be made.

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*Cambridge & A. G.*, and *Gaselee*, contra. This is not a First point. In which the proprietors of a navigation are rated in respect of a sum greater than their receipts, nor is it a case in which a lower toll is taken than they are by act of Parliament entitled to receive. The proprietors have not equally distributed the sum to which they are entitled to the whole line of navigation between Guildford and Farnham. If the principle contended for on the other side is allowed to prevail, the consequence will be, that the proprietors may, if they think proper, make the deductions exceed the amount of tolls taken in any particular parish. It would be extremely unjust to give the

4 Mann. & Ryl. 143; 9  
& Cressw. 68; 2 Mann. &  
Mag. Ca. 139.

*Ante*, i. 662; 4 Barn. &  
61.

3 Barn. & Adol. 533.

7 Barn. & Cressw. 61.  
D.L. III.

And see *Rex v. Avon Navigation  
Company*, 4 Mann. & Ryl. 23;  
2 Mann. & Ryl. Mag. Ca. 91.

(e) 5 Mann. & Ryl. 106; 10  
Barn. & Cressw. 163; 2 Mann.  
& Ryl. Mag. Ca. 588.

(f) 1 Barn. & Adol. 403.

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proprietors the power of so apportioning the toll thereby avoiding the payment of rates in any parish which the relief of the poor might happen to be particularly burthensome. It is manifest, upon an examination of the act of parliament which gives the proprietors authority to take toll, that this was intended to be a millage toll. The principle of *Rex v. Kingswinford* is not disputed, but it is inapplicable to the present case. That was a canal company; this is a river navigation which is regulated by a local act of parliament. The principle of *Rex v. Kingswinford* is to be adopted where the expenditure in a particular parish exceeds the profits; if it fits, the proprietors could not deduct that expenditure from the profits in the other parishes. The consequence would be, that the Company would be rated for more profit than they actually received. In this case this is a river navigation, a greater quantity of land is given direct distance, is probably, by reason of the circuitry of course, occupied in some parishes than in others; and therefore a millage rate is the most equitable mode of rating.

Second point.

Then, with respect to the deductions, it is admitted that the sum expended in repairs must be deducted. But there is no reason why the compensations should be allowed, nor why 10 per cent. should be deducted from the tenants' profits. Mr. Dalmahoy's groats ought not to be deducted, since they are paid in respect of land in Woking. The sums paid in respect of the millage, the per-centages to Lord Montagu and to the Corporation of Guildford, are in the nature of charges upon the property, and ought not to be considered in determining the amount of rateability. *Rex v. Aire and Calder Navigation* and *Rex v. Adames* are distinguishable.

Cur. adv. 1

Lord DENMAN, C. J., in the course of this term delivered the judgment of the Court as follows:

The rule by which canal companies are to be rated is thus laid down in *Rez v. Kingswinford* (a). "A canal company is to contribute to the relief of the poor in each parish through which the canal passes, *in proportion to the profit* which they derive from *the use of their land in that parish*." It is also truly observed in the same judgment, that if the traffic be the same through the whole line, every part of the canal will earn an equal proportion of the tolls; and that, on the other hand, if the profit vary in different parishes, the rate also must vary. Apply that principle to the present case:—The "through" trade pays one gross sum for the whole line, and all parts of the line are equally profitable: the proportion of Woking must therefore be ascertained by a milage calculation with reference to the whole line. Again, the "short" trade pays one gross sum for the whole distance gone over, and all parts of that distance are equally profitable. The proportion of Woking must therefore again be ascertained by a milage calculation with reference to the whole distance gone over. The tolls earned by passing over parts of the canal which do not include Woking, will be wholly excluded. By the facts found in the case, the true proportion of Woking in the gross receipts, according to this calculation, is 388*l.* 14*s.* 2½*d.*

The next question is, what deductions ought to be made from this sum? The necessary repairs and expenses must of course be deducted; and as they are found to be equal throughout the line, the proportion of Woking is to be ascertained by a milage calculation, and is found by the case to be 384*l.* 2*s.* 10*d.*

(a) 1 Mann. & Ryl. 20, and 7 Barn. & Cressw. 236; 1 Mann. & Ryl. Mag. Ca. 43.

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First point:  
Principle of  
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Second point:  
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Mr. *Dalmahoy's* groats are payable in respect of the use of the canal within his land in Stoke; and therefore if they could be deducted at all, they must be deducted from the profits in that parish, and not from the profits in Woking. But these groats, as well as the per-centages to Lord *Montagu* and to the Corporation of Guildford, are payable out of the profits of the canal, and are in truth nothing more than *rents-charge*. They do not affect the value of the *occupation* or the rent which a *tenant* would give, but only show amongst whom and in what proportions the rent or profit is to be divided. The poor-rates must be paid on the whole of the profits by those who receive them, viz. the proprietors; and they must settle the matter as they can with those who are entitled to share the profits with them. The same reasoning applies to the compensations to the mills; for they also are payable out of the profits. One only of the mills is situate in Woking, the compensation paid to which is 65*l.* 6*s.*; but, for the reasons stated above, we think that not even this sum can be deducted.

Upon the whole, the gross receipts earned in Woking are found, according to the principles here laid down, to be 688*l.* 14*s.* 2½*d.* From that sum must be deducted 384*l.* 2*s.* 10*d.* for repairs and expenses, leaving a balance of 304*l.* 11*s.* 4½*d.*, from which 10 per cent. for tenants' profits, amounting to 30*l.* 9*s.* 1½*d.*, must be deducted, according to the rule laid down in *Rex v. Trustees of Duke of Bridgwater* (a). The case, indeed, does not state distinctly that lands are rated at such rent, and no more, in Woking; but as it finds that 10 per cent. is a reasonable deduction for *tenants' profits*, we presume that the fact is so; and this deduction must be made in

(a) 4 Mann. & Ryl. 143, and 9 Barn. & Cressw. 68; 2 Mann. & Ryl. Mag. Ca. 139.

order to equalize the rate; and the sum at which the appellants ought to be rated in Woking will then stand 274*l.* 2*s.* 2*½d.*

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Rate amended accordingly.

The KING v. BENJAMIN ROUND.

UPON the application of the churchwardens of the parish of Wednesbury, Staffordshire, a writ of mandamus to the following effect issued, of the teste of 7th May, 1834:

“Whereas We have been informed that you *B. Round* exercised the office of a surveyor of the highways within the parish of Wednesbury, from Michaelmas 1827, to

To a mandamus requiring *A.*, a churchwarden, to deliver to the churchwardens certain books of account, assessments, &c. in his custody,

power, or possession, it is a good return to say, that on and since the teste of the writ, *A.* had not, nor has had the books &c., or any of them, in his custody, power, or possession.

If *A.* goes on unnecessarily to state that he had them not on a prior day, when it is surmised in the mandamus that they were demanded by the churchwardens, he is not bound to negative a possession intermediate between the demand and the teste of the writ.

Whether, under the circumstances, the books &c. were in the power of *A.*, is a question to be raised by a traverse to the return (*a*), or by an action for a false return (*b*).

(*a*) At common law, a return to a mandamus was not traversable. If the return were good upon the face of it, the only remedy of the party ousted of his remedy by mandamus by the falsity of the return, was an action on the case, (*post*, 311, *n.*, and see *Anon.* *Lofft*, 371;) but now by stat. 9 *Ann.* c. 20, after reciting that persons who have a right to the office of *mayors or other offices*, within cities, towns corporate, boroughs and places, or to be *burgesses or freemen* thereof, have either been illegally turned out or have been refused to be admitted thereto, and have no other remedy to procure themselves to be admitted or restored, than by writs of mandamus, the proceedings on which are very dilatory and expensive,—it is enacted, that the persons prosecuting such writ may *plead to*, (*i. e.* may confess and avoid,) or *traverse* all or any of the material facts contained within the return; to which the persons making such return shall reply, take issue, or demur; and such further proceedings, and in such manner, shall be had herein for the determination thereof, as might have been had if the persons suing such writ had brought their action on the case for a false return; and if any issue shall be joined on such proceeding, the persons suing out such writ shall try the same in such place as an issue joined in such action on the case should have been had; and in case a verdict shall be found, or judgment given for them upon demurrer, or by *nihil dicit*, or for want of a replication or other pleading, they shall recover damages and costs, and a peremptory writ of mandamus shall be granted without delay for them for whom judgment

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6th October, 1832; and that divers books of accounts, assessments, rates, and other documents, relating to the highways within the said parish, during the aforesaid period, *are now in your custody, power, or possession*, which books of accounts &c. of right ought to be delivered to J. A. and S. C., churchwardens of the said parish, to be kept for the use of such parish; and that although you have been oftentimes required, on behalf of the said churchwardens, to deliver to them the said books &c. to be kept as aforesaid, yet you have hitherto neglected and refused, and yet do neglect and refuse to deliver up the same to the said churchwardens for the purposes aforesaid, but, on the contrary thereof, still unjustly detain the same in your custody, possession, or power, in contempt &c.:—We do command you the said B. R., that immediately after the receipt of this, Our writ, you do without delay deliver or cause to be delivered to the said J. A. and S. C., churchwardens of the said parish, all books of accounts &c. *in your custody, power, or possession*, relating to the highways within the said parish, during the period of your serving the said office, or any part thereof, to be kept &c., or that you shew cause to the contrary thereof &c.”

In Trinity term, 1834, the following return was made by the defendant:—“ I had not on the 7th day of May, 1834, nor have I since hitherto had, nor have I now in

shall be given, as might have been if such return had been adjudged *insufficient*; and in case judgment shall be given for the persons making such return, they shall recover costs; such damages and costs to be levied by ca. sa., fi. fa., or elegit.

By this statute the power of traversing, or of confessing and avoiding the return, appears to be limited to the particular cases of the admission or restoration of mayors and other municipal officers, burgesses, and freemen, and the Highway Acts do not *expressly* give any such power; *ideo quæritur*.

“ It appears from the wording of the statute, that there are many cases to which it does not extend, therefore in all those cases the proceedings must be according to the course of the common law.” Bull. N. P. 204.

(b) The Court will not try the truth of a return upon *affidavits*, though a strong case of fraud be disclosed; *Goubot v. De Crouy*, 1 Crompt. & Mees. 772, 3 Tyrwh. 906, 2 Dowl. P.C. 86.

my custody, power, or possession, any book or books of account &c., relating &c.; nor had I any such in my custody, power, or possession, when I was required, on the behalf of the within-named churchwardens, to deliver the same to them; therefore I am unable to deliver any such to the within-named *J. A.* and *S. C.*, as within I am commanded."

A rule nisi to quash the return, and for a peremptory mandamus, having been obtained, the case was set down in the crown paper for argument.

*Sir F. Pollock*, for the crown. The return is insufficient and evasive, inasmuch as the defendant only says that he had not the books &c. in his possession on the day of issuing the writ, nor since, and that he had them not when required by the churchwardens to deliver such books &c. to them; and it is quite consistent with the return that he may have had them in September, 1832, when he went out of office, and also in all the intervals between the applications of the churchwardens down to the day previous to that on which the mandamus issued. The defendant is called upon to deliver the books &c. to the churchwardens, or shew cause to the contrary. By 13 *Geo. 3*, c. 78, s. 48, a positive duty to have these books &c., and to transmit them to the churchwardens or overseers, is thrown upon the surveyor of the highways of any parish &c., and therefore even supposing the return to mean that the defendant had not the books when first applied to for them, and has not had them since, that is insufficient, for he ought to *account* for not having them as in duty bound. Unless he does this, he fails to shew sufficient cause why he does not deliver the books &c. He may have parted with the possession illegally. He may have delivered the books &c. to some

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person to hold during the discussion with respect to them, or to some person *bonâ fide* entitled to hold them as against him. If the return had stated fully what had become of the books &c., the Court might have determined whether, in point of law, they were in the custody, possession, or *power* of the defendant, whereas on this return nothing is stated but an inference of law, which may not be warranted by the facts. In the cases already suggested, it could not be truly said that the books &c. were not in the *power* of the defendant, yet he might *think* himself warranted in returning that such was the fact. Further, if the return had stated the facts, the Court might have proceeded against the party in whose custody, possession, or power the books actually were.

Sir *W. Follett*, *contra*, was stopped by the Court.

PATTESON, J. (*a*).—In the absence of any authority, I see no reason to doubt the sufficiency of the return. The command is, that immediately after the receipt of the writ, the defendant shall deliver to the churchwardens all books of accounts &c. in his custody, power, or possession, (that is, at the time of issuing the writ,) relating to &c., or shew cause to the contrary thereof. The return states *more* than is necessary, for it states that the defendant had not the books &c. on the day of issuing the writ, nor has had them since, and then adds, that he had them not when required on behalf of the churchwardens to deliver them. An argument is raised,—and perhaps the inference is legitimate,—that in the intervals he had them. Supposing that were so, yet if

(*a*) Lord *Denman*, C. J., was absent on account of severe indisposition.

he had them not on the day of *issuing the writ*, or since, it is sufficient to return that fact. Then it is objected that the facts relating to the custody &c. of the books &c. should have been stated, in order that the Court might see whether they were in the defendant's custody, *power*, or possession; but whether they were so or not is a question of *fact*. The allegation in the return might have been traversed by the prosecutor; or now an action for a false return (a) might be brought, and then the question whether the books &c. were in the defendant's power might be discussed. If there were any *authority* to shew that the party was bound to state in his return *what he had done with* the books, the case would have been different. No such authority has been shewn to us, and I know of none.

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WILLIAMS, J.—If the defendant has employed the language of the return in a sense different from that which properly belongs to it, an action for a false return will lie; for instance, if he had collusively delivered over the books to another person.

Rule discharged without costs.

(a) As to the action on the case for a false return, see 2 Abr. tit. Sheriff; *Griffith v. Walker*, 1 Wils. 336; *Anon.* 2 Wms. Saund. 150 a, 155; Com. Chitt. Rep. 392; *ante*, 307, (a). Dig. tit. Return, (F) 2; Bac.

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The KING v. The Archdeacon of MIDDLESEX and another.

Where two sets of persons have each a colourable title to the office of churchwarden, both ought to be sworn in, *admitt*: (c)

Held, that the ordinary is bound to swear in churchwardens-elect immediately upon their applying to be sworn in (d), notwithstanding an usage not to swear in until the first visitation after Easter.

A RULE had been obtained for a mandamus to be directed to Dr. Potts, the archdeacon of the archdeaconry of Middlesex, and Dr. Phillimore, his surrogate, to admit *James Haywood* and *Robert Taylor* as churchwardens, and *Michael Staunton*, *Richard Cobbett* the younger, *Benjamin James*, and *William Henry Clark*, as sidesmen (a) of the parish of St. Martin's in the Fields, for the year ensuing.

The application was made under the following circumstances:—On the 20th of April, 1835, a vestry meeting was held for the purpose of electing churchwardens and sidesmen for the parish. The election being contested by two parties, a poll was demanded and taken, and a scrutiny was afterwards demanded. Scrutineers were appointed by each party. Those appointed by one party objected to the reception of a plurality of votes, which the chairman had received, and which the other scrutineers contended that certain of the voters were entitled to under 58 Geo. 3, c. 69, sect. 3 (b).

(a) For the nature of this office, and for the origin of the term sidesmen or *synodsmen*, see Burn's Eccl. Law, *tit.* Churchwarden.

(b) By sect. 3, "Every inhabitant who shall, by the last rate which shall have been made for the relief of the poor, have been

assessed and charged upon, or in respect of any annual rent, profit, or value not amounting to 50*l.*, shall have and be entitled to give one vote and no more; and every inhabitant there present, who shall in such last rate have been assessed or charged upon or in

(c) Or to a mandamus to swear in one of the two sets, &c., containing the usual surmise, that the prosecutors of the mandamus were duly elected, the officer may, at the peril of an action, return that the prosecutor was not duly elected. *Rex v. P. Williams*, 3 Mann. & Ry. 402; 8 Barn. & Cressw. 681; *Anthony v. Seger*, 1 Hagg. 10. Such a return could not be quashed for insufficiency: *Rex v. P. Williams*, *ubi supra*. Nor does it appear to be traversable: *ante*, 307, n.

(d) On the other hand, a churchwarden duly elected may be required by the Spiritual Court to take the oath of office before the proper ordinary. *Cooper v. Allnutt*, 3 Phillim. 166.

owing such plurality of votes a large majority was to the parties applying for this mandamus, and it was made to that effect by the scrutineers appointed by their party; but the other scrutineers refused the report. On the 27th April the present applicants attended at the chambers of Dr. Phillimore, at the House of Commons, and applied to be admitted and to take the oaths of their several offices. Dr. Phillimore, in answer to this application, said, that he considered he could not admit the parties until the annual visitation which would take place on the 9th of May. He stated that it was customary in the archdeaconry of Middlesex, for the churchwardens and sidesmen to be admitted to office after the annual visitation next after the election; but that the custom had been departed from, and the parties admitted immediately after their election (a),

of any annual rent or profits, or value, amounting to 10s. or upwards, (whether or in more than one sum or charge), shall have and be entitled to give one vote for every annual rent, profit, and charge upon or in respect of which the land has been assessed or rated in such last rate, so, nevertheless, that no inhabitant shall be entitled to give more than one vote; and in case where more of the inhabitants of a parish shall be jointly rated, they shall be entitled to give one vote according to the proportion of the amount which shall be borne by each of the joint charge; and if only one of the persons so rated shall attend, he shall be entitled to vote according to the proportion in respect of the whole of the charge."

(a) By the 90th canon of 1603, churchwardens are to be chosen in Easter week, (1 Gibs. Cod. first edition, 242). The 118th canon requires the swearing in to be in the first week after Easter, *or some week following, according to the direction of the ordinary*, (Ibid. 243).

The 140th canon of 1603 declares, that "whosoever shall affirm that no manner of person, either of the clergy or laity, not being themselves particularly assembled in the sacred synod, are to be subject to the decrees thereof, in causes ecclesiastical (made and ratified by the king's majesty's supreme authority), as not having given their voice unto them; let him be excommunicated, and not restored until he repent and publicly revoke this his wicked error." (2 Gibs. Cod.

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upon the surrogate's being satisfied that a case of emergency had arisen to justify such a course. The parties intimated that they intended to apply for a mandamus, which Dr. *Phillimore* stated he would very readily obey.

*Campbell*, A. G. now shewed cause. It is admitted that where two parties have made out a colourable title to the office of churchwarden, the ecclesiastical authority is bound to admit and swear in both parties. Before, however, the Court grants a mandamus, it will see that there has been a direct refusal to do the act which by the proposed mandamus is to be commanded to be done. In the present instance there has been no direct refusal to administer the oath to the parties.

The application to Dr. *Phillimore* was premature. The practice of the archdeaconry of Middlesex is, for the churchwardens-elect to be admitted and sworn in by the surrogate, upon the first visitation which takes place after Easter, and for the former churchwardens to remain in office until that period.

The application was irregular, being made to Dr. *Phillimore* at his chambers, and not to him while acting in his official character of surrogate. It does not appear that any application was made on the 9th of May, which was the day on which the applicants were informed by Dr. *Phillimore* that they might be admitted.

474.) Notwithstanding this denunciation, it has been questioned how far these canons are binding upon the laity even in matters ecclesiastical. See *Grove v. Dr. Elliot*, 2 Vent. 41; *Hill v. Good*, Vaugh. 302; *Middleton v. Croft*, 2 Stra. 1056; *S. C. Cas. temp. Hardw.* 57, 326, 395, and 4 Vin. Abr. 320, pl. 14, from MS.; Com.

Dig. tit. Canons (C). And see *Caudrey's case*, 5 Co. Rep. i—xxxii. b; Cases of Convocations, 12 Co. Rep. 72; 2 Inst. 653, 8; *Bird v. Smith*, Fra. Moore, 781, 783, third point; *Matthew v. Burdett*, 2 Salk. 412; 2 Gibs. Cod. 974, 984; Wats. C. L. 23, 24; *post*, 316 (a).

Sir *W. Follett* (with whom was *Steer*) in support of the rule. No good reason for not admitting and swearing in the parties on the 27th of April has been shewn. There was a direct refusal on the part of Dr. *Phillimore* to admit and swear in.

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The usage which has been mentioned is not a custom in the legal sense. If it is to be considered as a custom, it is one which cannot be supported. Churchwardens are, by statute (*a*), to be elected on Easter Monday, and they have a right to be sworn in immediately upon election. The practice undoubtedly is, for the churchwardens to be sworn in by the surrogate of the archdeacon, but the place is immaterial. They may be sworn in at the surrogate's chambers or any where else.

Dr. *Phillimore's* answer amounted to a *refusal* to swear the parties in on the day on which the application was made. He had no right to require them to wait until the day of the visitation. (Here he was stopped by the Court.)

LORD DENMAN, C. J.—It is to be lamented that the surrogate did not swear in the parties when they applied to him for that purpose. That which he said amounted to a refusal. His answer amounts to this, “I will not admit you now, because it is customary, in the archdeaconry of Middlesex, to swear in the churchwardens upon the first visitation day, which will be on the 9th of

(*a*) By 43 *Eliz.* c. 2. the churchwardens of every parish, and four, three, or two substantial householders there, as shall be thought meet, to be nominated yearly in Easter week, or within one month after Easter, under the hand &c., shall be called overseers of the poor of the same parish. This statute requires the *supplementary* overseers,—those whom it *associates* with the churchwardens,—to be elected within one month after Easter; but seems to treat the churchwardens themselves as persons already in office. And see *ante*, 313 (*a*).

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May." The churchwardens had a right to be admitted when they applied. This rule must therefore be made absolute.

It is clear, according to the old practice, that where there are two sets of parties who have each a colourable title to the office of churchwarden, both sets must be sworn in.

The other judges concurred.

Rule absolute(a).

(a) The form of the oath to be administered is; "You shall swear truly and faithfully to execute the office of a churchwarden within your parish, and according to the best of your skill and knowledge, present such things and persons as, to your knowledge, are presentable by the laws ecclesiastical of this realm."

Gibs. Cod. 216. Where the ordinary knows that the party applying to be sworn in has no legal title, it seems to be less objectionable to return non debito modo electus to a mandamus, (*vide ante*, 312, (a)), than to administer an oath under circumstances which render it idle and inoperative.

### The KING v. The Justices of SUFFOLK.

Under 79th  
section of the  
Poor Law  
Amendment  
Act, notice of

A Rule nisi had been obtained for a mandamus, commanding the justices to enter continuances, and hear the appeal of the overseers of Manningtree against an order of removal need not be given within twenty-one days from the time of sending the notice of chargeability and the copies of the order and examination to the overseers of the parish charged by such order.

Held, that the practice as to notices of appeal not being expressly altered by the act, remains as before, although, by sect. 81, the statement of the grounds of appeal is required to be delivered with such notice, or at least fourteen days before the sessions; and therefore where, by the practice of the sessions, eight days' notice only is required, a notice of appeal, given eight days before the sessions, is sufficient, provided such statement of the grounds of appeal be delivered fourteen days before the sessions; at least where the delivery of such statement is accompanied with the service of a notice of appeal *de facto*, although such notice be erroneous, as purporting to be given for the *borough*, instead of the *county* sessions.

for the removal of a pauper from the parish of St. Margaret, in Ipswich, to Manningtree.

The affidavits disclosed these facts:

17th Sept. 1835, the order of removal was made, a copy of which, together with a copy of the examinations and a notice of chargeability, was on the following day transmitted to the overseers of Manningtree.

9th October, the overseers of Manningtree sent to the officers of the removing parish a notice of appeal for the next General Quarter Sessions to be holden for the borough of Ipswich, accompanied with a statement of the grounds of appeal.

13th October, the overseers of Manningtree, discovering that they had erroneously given notice of appeal for the borough sessions, sent to the officers of the removing parish a notice of appeal for the next General Quarter Sessions to be holden for the county of Suffolk, and referred to the statement of the grounds of appeal, sent with the former notice.

By the practice and rules of the Suffolk Quarter Sessions, eight days' notice of appeal is sufficient.

23d October, the county sessions commenced; and the justices, considering that notwithstanding the practice of the sessions, notice of appeal ought, under the Poor Law Amendment Act(a), to have been given within twenty-one days from the time of sending the notice of chargeability, &c., and that the notice of 9th October was a nullity, refused to hear the appeal.

*Biggs Andrews* shewed cause. It will probably be contended that the notice of appeal to the borough sessions was a sufficient notice, and *Rex v. Justices of Carmarthen*(b) will probably be cited in support of that

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First point:  
Whether notice of appeal must be given within twenty-one days after notice of chargeability.

(a) 4 & 5 Will. 4, c. 76.

(b) 4 Barn. & Ald. 291.

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 c. 76, s. 79.

argument. The notice of appeal to the borough sessions in this case is, however, clearly erroneous in itself, and cannot be considered as tantamount to a notice of an intention to appeal to the county sessions; and *Rex v. Carmarthen* is manifestly distinguishable. The notice of 19th October was too late. Notice of appeal ought, since the passing of the Poor Law Amendment Act, to be given within twenty-one days from the time of sending the notice of chargeability, &c. Sect. 79 of that statute enacts, that no poor person shall be removed under any order of removal until twenty-one days after a notice in writing of his being chargeable or relieved, accompanied by a copy or counterpart of the order of removal, and by a copy of the examination upon which such order was made, shall have been sent by the overseers of the parish obtaining such order to the overseers of the parish to whom such order shall be directed. Then there is a proviso that if the last-mentioned overseers shall agree to submit to such order, and to receive the pauper, it shall be lawful to remove him, although the twenty-one days shall not have elapsed; and a further proviso is, that if notice of appeal against such order of removal shall be received by the overseers of the removing parish within the twenty-one days, it shall not be lawful to remove the pauper until after the time for prosecuting such appeal shall have expired, or, in case such appeal shall be duly prosecuted, until after its final determination. The main object of this enactment appears clearly to be to prevent the pauper from being removed whilst his settlement is in litigation; and unless the Court hold that no appeal can be prosecuted unless notice be given within twenty-one days, the section will, virtually, be almost repealed. There are four cases in which the legislature intend that the parish obtaining the order shall have power actually to remove the pauper;

viz.—1st, where the twenty-one days have elapsed without any notice of appeal having been received by the removing parish; 2dly, where the overseers of the parish charged by the order agree at once to submit to the order; 3dly, where, notwithstanding notice within the twenty-one days, no appeal is prosecuted in due time; and 4thly, where the appeal is determined against the appellants. In each of the last three cases, it is quite clear that the settlement of the pauper is no longer capable of being litigated; and it is submitted that the legislature clearly contemplated putting the only remaining case on precisely the same footing as regards the completion of the right of removal in the one parish,—right of actual removal being concurrent with the extinction of the right of litigating the settlement in the other. The twenty-one days allowed give abundant time for determining upon the propriety of appealing against the order. Unless the notice is required to be given within the twenty-one days, the ordinary course will probably be for the parish charged by the order to take no notice of the order, until executed by actual removal, in the hope of procuring from the pauper evidence of his being settled elsewhere. An appeal against an order of removal is always to the quarter sessions of the county in which the removing parish is situate; a circumstance which, in some cases, may make the removal of the pauper, whilst a right of appeal remains in existence, highly inconvenient. As long as the right to appeal continues, the order of removal is of course liable to be quashed; and if it be quashed, the actual removal will have caused a useless expenditure of the parochial funds. Upon the 79th section the intention of the legislature is abundantly clear, but if the 80th and 81st sections be taken in conjunction with the 79th, the intention becomes even far more manifest. By the 80th sec-

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tion the overseers of the parish, giving *such notice of appeal*, have the right of free access to the pauper for the purpose of examining him touching his settlement; and in case it shall be necessary for the more effectual examination of the pauper that he should be taken out of the removing parish, such overseers are to be permitted to remove him therefrom (at the expense of the parish charged by the order) for the time that may be necessary for that purpose. This section also clearly contemplates that the pauper is in no case to be removed until after the right of appeal is gone, and that all notices of appeal are to be given within the twenty-one days. The 81st section enacts, that in every case where notice of appeal against such order shall be given, the overseers of the appellant parish shall, *with such notice*, or fourteen days at least before the first day of the sessions to which such appeal is intended to be tried, send or deliver to the overseers of the respondent parish a statement of the grounds of such appeal; and it shall not be lawful for the overseers of such appellant parish to be heard in support of *such* appeal, unless such notice and statement shall have been given as aforesaid. In various parts of this section there are words of reference, which shew that the notice mentioned is such a notice as is spoken of in section 79, and that the appeal contemplated is an appeal entered in pursuance of such notice. The overseers of the appellant parish are not to be heard *unless such notice shall have been given as aforesaid*. It seems to be impossible to give any other meaning to these words than this,—that no appeal shall be entertained unless such a notice as is mentioned in the 79th section has been given.

Second point:  
Whether fourteen days' notice of appeal required.

But, supposing that the Court should be of opinion that the notice need not be within the twenty-one days, still a notice, given on the 19th October, of an intention

to appeal to the sessions commencing on the 23d of that month, is too late. The 81st section requires that a statement of the grounds of appeal shall be given with the notice *fourteen days at least* before the first day of the sessions at which the appeal is intended to be tried. Here the *notice* was only ten days before the sessions. [Lord Denman, C. J. If the notice on the 9th of October is sufficient, there was a notice fourteen days before the sessions.] But that notice was erroneous. [Lord Denman, C. J. The mistake in the notice of appeal does not affect the statement of the grounds of appeal, delivered at the same time with such notice, under this act of parliament, unless you were misled by it.] The removing parish may have known that there could be no appeal to the borough sessions; but they may also have been in error upon the subject. [Coleridge, J. I do not see how the 81st section helps you. The appellants, by delivering the *statement* of the grounds of appeal fourteen days before the sessions, have in terms complied with the enactment in that section.] It is to be inferred from that section that the *notice* must also be at least fourteen days before the sessions; for otherwise the statement of the grounds of appeal may *precede* the notice of appeal. [Patteson, J. Which certainly seems absurd.] According to the argument which will be pressed *contrà*, the notice of appeal will be sufficiently early if given *eight* days before the sessions, although the statement of the grounds of the intended appeal must be given at least *fourteen* days before the sessions. The notice of appeal ought, of course, either to precede the statement of grounds or to accompany it.

*Thesiger*, *contrà*. The first notice was sufficient for the purpose for which it was required. It is quite clear that the appeal could not lie to the *borough* sessions.

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The 3 *Will. & Mary*, c. 11, gives the appeal against any order of removal to the next general quarter sessions of the peace to be held for the county, riding, city, town corporate, or liberty, from which the pauper was removed. The 8 & 9 *Will.* 3, c. 30, gives the appeal to the general or quarter sessions of the peace for the *county, division or riding*, wherein the parish, township or place, whence the pauper shall be removed, doth lie, and not elsewhere, any former law or statute to the contrary thereof notwithstanding. The overseers of the removing parish must have known by this notice that it was intended to enter an appeal at the next quarter sessions for the county, that is to say, at the next quarter sessions at which such appeal *could* be entered. In *Rex v. Justices of Carmarthen* (a) an order of removal was made by two justices of Carmarthen, which is a county of itself, having (by charter) general sessions twice a year, and not quarter sessions. A notice of appeal, stating an intention to appeal to the next *quarter* sessions of the borough of Carmarthen having been given, it was held that the justices at the next *general* sessions were bound to receive the appeal. The notice in the present case is, for all the purposes for which the notice is required, as good as if the error in question had not existed.

But, supposing the notice of 9th October not to be a valid notice, that on the 13th is in every respect unobjectionable. The act of 13 & 14 *Car.* 2, c. 12, s. 2, gives all persons aggrieved by any order of removal an unconditional right to appeal to the sessions. A statutory right, such as this, cannot be limited except by express enactment; and however open the act of 4 & 5 *Will.* 4, c. 76, may be to speculation as to the intention of the legislature with respect to notices of appeal, there

(a) 4 Barn. & Ald. 291.

is no enactment sufficiently express to alter the existing state of the law. (Here he was stopped by the Court.)

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Second point.

LORD DENMAN, C. J.—We think that by this act it was not intended to interfere with the practice of the sessions. Such an intention, if it had been entertained, would have been expressed in plain terms. It appears to us, therefore, that the practice as to notices of appeal must stand exactly as it did before the act passed. The act requires that a statement of the grounds of appeal shall be given with the notice, or at least fourteen days before the commencement of the sessions. It appears to me that this was done on the 9th October, for that though the notice of appeal which accompanied the statement was a notice to the wrong sessions, yet the statement of the grounds of appeal was available to all purposes. As, therefore, the notice was in due time according to the practice of the sessions, and the statement of the grounds of appeal was sufficiently early under the act of parliament, the sessions ought to have entertained the appeal.

PATTESON, J.—The notice on the 9th of October stated the grounds of appeal. That is a compliance with the act. If it be an absurdity that the statement of the grounds of appeal is required to be given earlier than the notice need be given, then it is an absurdity introduced by the act of parliament itself.

WILLIAMS, J.—The only novelty introduced by the 79th section of the act is,—that the pauper shall not be actually removed within twenty-one days unless with consent, nor, if there be a notice of appeal, within that period, until the time for prosecuting the appeal has

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expired, or the appeal has been heard and determined. That is the only change effected by that section.

And the novelty introduced by the 81st section is,—that a statement of the grounds of appeal must be sent or delivered to the respondent parish at least fourteen days before the sessions. That has been effectively done here. Whether timely *notice* of appeal was given depends upon the practice of these particular sessions,—which stands as it did before the passing of the Poor Law Amendment Act.

First point.

COLERIDGE, J.—It is admitted that there was no notice within the twenty-one days: therefore if Mr. *Andrews* is right in his argument, that the 79th section imperatively requires every notice of appeal to be given within the twenty-one days, the sessions have acted properly in refusing to entertain the appeal. The *words* of the statute do not, in my opinion, require the notice of appeal to be given within the twenty-one days: I think it quite clear that it never was intended to go that length. The mischief intended to be provided against was the immediate removal of paupers. Paupers were *de facto* removed immediately upon the making of the order of removal, without previous communication with the parish charged by the order, and without giving any time for investigating the grounds of the removal. The intention was only to prevent a removal within twenty-one days. The words of the act are only that the pauper shall not be “removed or removable,” &c. It does not say that there shall be no appeal unless a notice of the intention to appeal be given within twenty-one days. If this had been intended, the obvious course would have been to have inserted plain words to that effect.

Second point

Then, with regard to the 81st section. We are called upon to make a general alteration in the practice of all

the Courts of Quarter Sessions in the kingdom, upon the ground of a mere implication arising out of a supposition that some absurdity will be introduced if the practice be not so altered. The section does not say that the *notice* shall be given fourteen days before the sessions, or at any particular time. I think that the obvious meaning of the act is, that where any greater time than fourteen days is required by the sessions for the notice of appeal, then you may deliver the statement of grounds with your notice, or if not, that you should deliver the statement of grounds at least fourteen days before the sessions.

If any practical absurdity does arise out of this enactment, it is one which we cannot remedy.

Rule absolute.

—◆—

The KING v. The Inhabitants of WILLOUGHBY, in the County of WARWICK.

UPON appeal against an order of two justices of Northamptonshire, for the removal of *Wm. Roddis*, his wife and four children, from the parish of Byfield, Northamptonshire, to the parish of Willoughby, Warwickshire, the Northamptonshire quarter sessions, held 10th April, 1834, confirmed the order, subject to the opinion of this Court upon the following case :


The pauper rented a house in the parish of Willoughby, from Michaelmas, 1852, to Michaelmas, 1833, of a Mr. *Judd*, at the yearly rent of 17*l.* He occupied the house under this hiring for the whole year, and in subsequent payment of the remainder of the rent, acquire a settlement in A., under 6 *Geo. 4*, c. 57, and 1 *Will. 4*, c. 18.

The forty days' residence required under this head of settlement, must be within the year of occupation ; but at what period of the year it takes place is immaterial.

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Where a party rents and occupies for a year, a tenement in A. at the yearly rent of 10*l.*, and before payment of the full rent, is removed to B. by an order, which is not appealed against, or is confirmed on appeal, he may, by a subsequent payment of the remainder of the rent, acquire a settlement in A., under 6 *Geo. 4*, c. 57, and 1 *Will. 4*, c. 18.

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the month of July paid a half-year's rent, 8*l.* 10*s.* He continued to occupy this house until the 6th of December, 1833, without paying any more rent. On that day he was removed with his family from Willoughby to Byfield, by an order of removal,—he having become chargeable to the parish of Willoughby. Against which order, the parish of Byfield appealed to the quarter sessions for the county of Warwick. The appeal was tried on the 1st of January 1834, and the order confirmed on the merits. On the 7th December, 1833, the pauper's family returned to their house at Willoughby, and on the next day the pauper himself returned and remained there in the same house until the 27th of the following January. On the 11th December, 1833, the pauper borrowed the sum of 8*l.* 10*s.* and paid his landlord his second half-year's rent, due at the preceding Michaelmas. On the 27th of January, the pauper left Willoughby with his family, and went to Byfield, where he remained until the 17th of the following March, when he was removed, by an order of two magistrates, back to Willoughby; and against that order the parish of Willoughby appealed.

The question for the opinion of the Court is, whether or not the pauper gained a settlement in the parish of Willoughby subsequent to the order of removal of the 6th December, 1833.

*Humfrey* and *Wildman*, in support of the order of sessions. At the time when the removal of the pauper from Willoughby to Byfield took place, he undoubtedly was not settled in Willoughby, inasmuch as he had not at that time paid rent to the amount of 10*l.* That order was therefore properly confirmed upon appeal. But by payment of the remainder of the rent since the removal, and thus satisfying the only remaining requisition of the

cts, the pauper has acquired a settlement in Willoughby, subsequent, in point of date, to the order of removal. In *Rex v. Fillongley* (a) it was held, that where a person entering and residing in a tenement of 10*l.* a year in A., was removed to B. by an order of justices, and immediately returned to the same tenement without making any new contract, and resided there more than forty days, he thereby gained a settlement, though the order of removal was unappealed against. That case depended upon 13 & 14 *Car.* 2, c. 12, and in principle much resembles the present case. *Rex v. Barham* (b) is almost exactly this case. There, a pauper on 6th April, 1823, hired a house for a year, at the rent of 12*l.* per annum, in the parish of A: In January, 1824, he became chargeable to that parish, and was, by an order of justices, removed to the parish of B: There was no appeal against the order of removal: The pauper returned on the same day to his house in the parish of A., and continued to occupy it until the expiration of the year for which he had hired it, and paid the rent for the year. It was contended that the effect of the order of removal was to prevent the gaining of any settlement, unless *all* that the act (59 *Geo.* 3) requires had been complied with after that order was made. But the Court held that the pauper had acquired a settlement in A. *Rex v. Ampthill* (c) will probably be cited *contra*, but that case, so far from being against the settlement in Willoughby, is strongly in favour of it. There, a pauper legally settled in A., took a house in St. B. at the yearly rent of 10*l.*: After residing in it a year, but before he had paid any rent, he became chargeable, and was removed by an order of justices to A: In a few days he returned, sold his goods, and paid the rent. An appeal against the

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(a) 2 T. R. 709.

(b) 8 Barn. &amp; Cressw. 99.


(c) 4 Dowl. & Ryl. 447; 2  
Barn. & Cressw. 847; 2 Dowl.  
& Ryl. Mag. Ca. 297.

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order having been entered, it was contended that the pauper had, at the time of the removal, an inchoate settlement in St. B., and that by payment of the rent afterwards, the settlement had become complete, and that therefore the order should be quashed. But this Court held, that as the pauper had not gained a settlement at the time of the removal, the order was good and could not be quashed. This shews that when all the requisites of the act, except the payment of the rent, are complied with before an order of removal, and afterwards the rent is paid, such payment does not *relate back* to the time when the compliance with the other requisites became complete. If the payment in this case had so related back, then undoubtedly the confirmed order would have been conclusive. But as the payment does not relate back, the settlement, which was inchoate on 6th December, must have become perfect from the date of such payment, unless it be considered that the rent must be paid within the year of the occupation. The statutes of 6 Geo. 4, c. 57, and 1 Will. 4, c. 18, upon which the settlement in this case depends, together make it necessary that the rent shall be paid by the party hiring and occupying the tenement, but it is not said that it must be paid within the year, or within any given time afterwards. If the payment of the rent at a period subsequent to the completion of the year of occupation, perfects a settlement in all other respects complete, *Rex v. Amptill* shews conclusively that a settlement was in this case gained *subsequently* to the order of removal of 6th December, 1833. *Rex v. Kenilworth* (a) will be relied on contra, but that was a case of hiring and service, and Lord Kenyon, C. J., in the subsequent case of *Rex v. Fillongley*, satisfactorily distinguishes it from the case of renting &c. a tenement.

(a) 2 T. R. 598.

If it should be considered to be necessary that a residence for forty days in the parish of Willoughby, subsequent to the order of removal, should be shewn, then it is submitted that forty days of the subsequent residence may be connected with the previous occupation. Upon this point, *Rex v. Ormesby (a)*, and *Rex v. Child-Okeford (b)*, were cited.

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*Waddington and Miller*, *contra*. The residence must be during the year of the occupation. Under 13 & 14 *Car. 2*, a settlement was gained by forty days' residence in a parish with an interest, as tenant or otherwise, in a tenement within the parish. To this, which is still, however, the foundation of the settlement, the requisitions of 59 *Geo. 3*, 6 *Geo. 4*, and 1 *Will. 4*, are added. According to the argument which has been offered *contra* upon this point, if a man occupied a tenement within the parish for a year, and performed all the other requisites, except a residence of forty days, he might then leave the parish, and upon returning at any subsequent period, and residing for forty days, would gain a settlement. [*Williams, J.* The residence must clearly be within the year of occupation.]

Where an order for the removal of a pauper is confirmed, the pauper is conclusively settled in the parish to which he is removed, unless every act necessary to acquire a settlement is done in another parish subsequently to such order. In *Rex v. Kenilworth (c)* it was held, that after an order of removal not appealed from, a new settlement can only be gained by some act or cause altogether subsequent to the order of removal. *Rex v. Fillongley (d)* was decided at the time when all that was

(a) *Ante*, i. p. 17; 4 Barn. & Adol. 214.

(b) 3 Barn. & Adol. 809.

(c) 2 T. R. 598.

(d) 2 T. R. 709.

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required in order to gain a settlement, was a residence of forty days, connected with some interest in a tenement. There was good reason therefore for holding that the forty days' residence after the removal, in that case, was sufficient. It is true that the residence was connected with an interest, originating in a contract entered into antecedently to the removal; but whether the interest took its origin from a contract antecedent to the removal, or subsequent to it, was immaterial, provided that there was an interest existing subsequently to the order, and a residence of forty days coupled with such interest. In *Rex v. Barham* (a) also, there was a residence for forty days subsequently to the order, and upon this fact the decision of the Court appears to be mainly founded. [*Patteson*, J. Lord *Tenterden* said that there was forty days' residence both before and after the removal, and all that the act required in other respects had been complied with. The residence after the removal was immaterial. It was the *holding* after the removal that made the settlement subsequent to the removal. It is quite clear that a residence for forty days at any time of the year is sufficient, provided there be an occupation for a year. In *Rex v. Kenilworth*, Mr. Justice *Bulwer* expressly put his decision on the ground that the order of removal unappealed against was a dissolution of the contract of *hiring and service*. In *Rex v. Fillongley* it was held, that the order (though not appealed against) did not dissolve the contract for *renting a tenement*.] *Rex v. Fillongley* was decided expressly on the ground that there had been, subsequently to the order, a residence for forty days, coupled with an interest in a tenement; which was all that was then requisite. [*Coleridge*, J. Suppose a sufficient occupation for a whole year, and a residence of forty days during that year, and that the

(a) *Ante*, 327.

rent were not paid until the 366th day, would not a settlement be gained? Surely the rent need not be paid within the year.] It need not; and if it be paid before an order of removal is made, a settlement will be gained. [*Patteson*, J. Then the question is, what would be the date of that settlement?] If an order of removal intervenes, the payment of the rent cannot be connected with the previous occupation &c., so as in effect to annul the order. *Rex v. Kenilworth* and *Rex v. Fillongley*, it is submitted, clearly shew that a complete settlement must be gained after the order of removal. In *Rex v. Kenilworth*, *Buller*, J. uses these strong words; "Now in this case, the pauper returned after the order of removal, to the parish of Birmingham, where he served a month; but that could not give him a settlement there; for the act subsequent to the order of removal, by which he was to gain a settlement, *should be complete in itself*." The main and substantial ground of gaining a settlement being the residence for forty days, it may perhaps be conceded that if there be a residence for forty days subsequent to the order, during the continuance of a year's occupation, commenced before the order, a settlement subsequent to the order is acquired. Upon that ground, *Rex v. Barham* appears to have been decided; as *Lord Tenterden*, C. J. in that case, after stating the effect of 59 *Geo. 3*, c. 50, says, "It should seem, therefore, that if a pauper resides for forty days upon a tenement, and the other requisites of the act have been complied with, he gains a settlement. Now in this case the pauper resided in the house more than forty days, both before and after the removal, and all that the act requires in other respects was complied with." The principle does not apply to all the other ingredients of a settlement, which have been added by way of restriction.

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PATTESON, J. (a)—This case depends upon the construction which we are to put on the statute, which requires that in order to gain a settlement by residence and renting and occupation of a tenement, the rent shall be paid for the same. There has not been any case in which the Court has decided that the rent must be paid within the year of occupation, or within a limited time after the expiration of it. It is said that it is not the occupation for a year, nor the payment of rent for a year, but the residence for forty days, that is the substantial ground of the settlement. That I do not deny: I admit that it is so: but still the question is,—what is the *date* that is to be given to the settlement when acquired? The *time* of the forty days' residence, whether at the beginning or the end of the year, is immaterial. In this case there was an occupation for a year, residence for forty days, (which residence may be in any part of the year of occupation,) and half a year's rent paid. Under these circumstances, an order of removal was made; and there can be no doubt but that at that time no settlement was gained. The order was appealed against, and pending the appeal the party returned to Willoughby, and paid the remainder of the rent, so as to complete the conditions of the act of parliament. It is quite clear that this having been done, so as to fill up all the requisites, the party gained a settlement, unless it is affected by the order of removal which intervened. The order has been treated in the argument as if it had the effect of putting an end to every inchoate settlement. I do not find any authority for so treating it. *Rex v. Kenilworth* (b) is relied on, but does not support the position for which it is cited. That was a case of hiring and service: the servant was removed under an order, which was not ap-


(a) Lord Denman, C. J. was disposition.

absent on account of severe in- (b) 2 T. R. 598, *ante*, 329.

pealed against; and he returned to his master's service at Birmingham. If there had been an appeal against that order, it is not doubtful but that the party would have had a right to return to his master, and might have completed his service; and if he had done so, he would have acquired a settlement in Birmingham. So Mr. Justice Buller appears to have considered; for he says, "The question here is, whether the pauper gained any settlement in Birmingham subsequent to the order of removal? Now, in this case he did no act by which he could gain a settlement in Birmingham after the order of removal. *What I rely on* is this, that after the order of removal, unappealed from, the pauper *could not legally return* to the parish from whence he had been removed." From this it follows, that, in his opinion, if the order *had* been appealed from, the pauper might have returned, and would have gained a settlement subsequent to the order. The learned judge then says, that it would have been a crime in the pauper to have returned, and that the order of removal therefore put an end to the contract of service. Whether he was right or wrong in this reasoning, is not now to be determined; but it shews how far his remaining words, which are the words relied on, are properly applicable to this case. The words are, "Now in this case the pauper returned after the order of removal, to the parish of Birmingham, where he served a month; but that could not gain him a settlement there; for the act subsequent to the order of removal, by which he was to gain a settlement, *should be complete in itself*." It is sought to be inferred from this, that all that is done towards gaining a settlement before the order of removal, must in every case be put out of consideration. These words, taken by themselves, might seem to warrant such an inference; but they must of course be construed *secundum subjectam materiam*, and being so construed, the

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inference is altogether shut out. The decision in *Rex v. Kenilworth* appears to me to rest on no legal principle. Can it possibly be said that if a man is serving or renting a tenement, and the parish officers choose to get him removed, the contract is thereby put an end to? I see no reason for so saying. It is true that the order of removal is conclusive, that at the time of making the order the pauper had no settlement in Willoughby; but the whole question comes to this,—whether, when a man has done all that is required except one thing,—the payment of the rent,—and such payment is made after an interval, the settlement is to take effect from the time of completing the *main* requisites, or from the final completion by payment of the rent. We have the authority of *Rex v. Ampthill* for saying, that the payment has no reference back; and therefore, if the settlement is not to be dated from the time when the last requisite is complied with, there never can be a settlement gained in such case. The argument of Mr. *Waddington* would indeed go this length. That, however, cannot be right. The pauper did in this case, in my opinion, gain a settlement in Willoughby subsequent, in point of date, to the order; and therefore the order of sessions must be confirmed.

WILLIAMS, J.—I am of the same opinion. There is no case to shew that the payment of the rent must be within the year of the occupation; and there is nothing in the nature of an order of removal to make a payment of the rent, after the order, have a different effect from a payment where no such order has been made. The words of Mr. Justice *Buller* have been relied on; but those words, when taken in connection with the doctrine which he had just laid down, and with which (whether the doctrine be right or wrong) they are consistent, are

o authority for the position in support of which they  
ave been cited.

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COLERIDGE, J.—It was conceded in the argument, that  
all the facts of this case might have existed, with the ex-  
ception of the order of removal, and that a settlement  
could in such case have been gained. The whole ques-  
tion therefore turns upon the effect of the order. Mr.  
*Vaddington* argues, that where an order of removal has  
been made, every thing necessary to the gaining a settle-  
ment must be commenced anew after the order; and for  
his position he cites *Rex v. Kenilworth*. Now the de-  
cision in that case, when examined, will be found to be  
no authority at all here, as it arose upon a different state  
of things, and proceeded on a supposition that the order  
of removal dissolved the contract, which, after *Rex v.*  
*Willongley*, certainly cannot be said to be the case here.  
The dictum of Mr. Justice *Buller* must be considered  
with reference to the subject-matter. The question then  
is, what is the effect of the order of removal? It merely  
determines the conclusion of law upon the facts existing  
at the time when it was made. If, at the time of making  
the order, nine only out of ten requisites had been com-  
plied with, then the order is conclusive, that a settlement  
was not gained by the performance of the nine requisites;  
but there is no authority whatever for saying that, upon  
the tenth requisite being added, the order is to have the  
effect of preventing a settlement from being gained.

Order of Sessions confirmed.



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Justices cannot make an order for stopping up part of a highway, as unnecessary, under 55 Geo. 3, c. 68, s. 2, unless they have viewed the highway together; nor, unless the finding that it is unnecessary be the result of that view.

But it is no objection, that previously to the view the road had been stopped up *de facto* by the owner of the adjoining land, without legal authority.

The view is sufficiently stated upon the face of the order in these terms, "*We &c. having upon found,*" &c.

It is no objection to such order, that in the part of it which directs that of the road to be stopped up shall be sold to the owner of the adjoining he be willing to purchase, or to some other person, that the words "for the full thereof," occur only at the end, and not also after the part which directs a the owner of the adjoining land, if willing.

Nor, that it does not contain any direction as to the application of the arising from the sale.

Nor, that no certificate of a sale is written by the justices at the foot of the

Nor, that the owner of the land adjoining to the road stopped up was at the time of making the order, waywarden of the parish in which the situate.

Nor, that the road has become unnecessary by reason only of the substitution by the owner of the adjoining land, of another road over his own land, in adoption by the public of such substituted road.

*Scilicet*, that upon motion for a certiorari to bring up an order of sessions containing an order of justices for stopping up a highway, the Court cannot enter objections to the validity of the order, whether on the ground of want of jurisdiction otherwise, unless such objections arise upon the face of the order itself.

AT the special sessions, held 11th September, for the division of Linton, in the county of Cambridgeshire, the following order was made :

"Cambridge, to wit.—We, &c., three of his majesties justices of the peace, acting in and for the division of Linton, in the said county, assembled at a special session held on the 11th September, 1834, *having upon found* that a certain part of a common and ancient highway, called the Walden Way, leading from & towards &c., situate &c., in the parish of Babraham, said county, (here the contents, the termini, and the situation of the part of the highway are stated,) is *useless unnecessary*, do hereby order the same to be stopped up and discontinued, and the land and soil thereof sold by the surveyor of the highways of the said county of Babraham, to *H. J. Adeane, esq.*, whose lands thereto, if he shall be willing to purchase the same, or to some other person or persons, for the full value thereof. Given, &c."

This order was appealed against by a Mr. *Mortlock*, but was confirmed by the sessions.

Mr. *Adeane*, through whose land the whole of that part of the Wadden Way, to which the order relates, ran, had stopped it up in 1825, without any magistrates' order, he having, six months previously, set out a new way over his own land.

At the time of making the order for stopping up the road Mr. *Adeane* was himself one of the surveyors of the highways for the parish of Babraham.


Upon affidavits stating the above facts, *Pollock*, A. G., in last Hilary term, obtained a rule nisi for a certiorari to remove into this Court the order of sessions confirming the above order, and all things touching the same.

Sir *W. W. Follett*, *Biggs Andrews* (for Mr. *Adeane*), and *Byles*, now shewed cause. The only question that can properly be raised upon the present motion is, whether the order of justices is good upon the face of it? Upon the motion for the rule nisi it was suggested that the order was, upon the face of it, defective in two respects; viz. first, that the *view* by the magistrates was not properly stated, for that, consistently with the magistrates "having *upon view* found &c.," their finding might have proceeded upon a view had by *other persons*, or had at a *distant period* of time, or upon a view taken by the justices *separately*. This order is made under 55 Geo. 3, c. 68, s. 2, which enacts, that when it shall appear upon the *view of any two or more of the said justices* of the peace, that any public highway, bridleway or footway, is *unnecessary*, it shall and may be lawful, by order of such justices, or any two of them, to stop up and to sell and dispose of such unnecessary highways &c., by such ways and means, and subject to such

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First point:  
Mode of stat-  
ing the view.

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exceptions and conditions, in all respects, as is mentioned in 13 *Geo. 3*, c. 78, in regard to highways to be widened and diverted, with the exception that the money to arise from the sale shall be paid to the surveyor, and to be applied towards the general repairs of the highways &c. of the parish. The sections of 13 *Geo. 3*, c. 78, which relate to the widening and diverting of highways, are s. 16 and s. 19. In each of those sections the enactment commences thus: "When it shall appear, upon the view of any two or more of the said justices of the peace, that" &c., which are precisely the same words as those used in the enactment in 55 *Geo. 3*, c. 68, s. 2; yet the forms (Nos. XVI. and XXI.) given in the schedule, and which forms are, according to s. 69, "to be used upon all occasions, with such additions or variations only as may be necessary to adapt them to the particular exigencies of the case," run thus: "We &c., *having upon view found* that" &c. So that in this case the form given in the schedule of the act is exactly pursued. This objection must have arisen out of a misconception of *Rex v. Justices of Worcestershire (a)*. [Lord Denman, C. J. We need not trouble you any further on that point.]

Second point:  
 Sale of old  
 road for the  
 value thereof.

It was also objected, that it does not appear to have been ordered, that in case the soil of the old road was sold to Mr. *Adeane*, it should be sold "for the value thereof," as the act requires. The words "for the full value thereof" occur at the end of the order, and over-rule the whole of that part of it which relates to the sale of the soil. It is true that in the form (No. XVIII.) given in the schedule to 13 *Geo. 3*, c. 78, the words occur immediately after that part which directs that the land be sold to the owner of the adjoining land, if he be wil-

(a) 8 Barn. & Cressw. 254, S. C. per nom. *Rex v. Rogers*, 2 Mann. & Ryl. 289; 1 Mann. & Ryl. Mag. Ca. 464.

g, as well as at the end of the order; but in s. 17, which contains the enactment to which the form in the schedule is applicable, the words are used as in this order, once only, and at the end. It cannot, therefore, be said that the order does *not substantially* pursue the form; and by sect. 69 it is enacted, that no objection shall be made or advantage taken *for want of form*, in any of the proceedings. [*Patteson, J.* The certiorari is taken away by 13 *Geo. 3*, c. 78. Is it not also taken away by 55 *Geo. 3*, c. 68?] It has been held that the certiorari is *not* taken away by 55 *Geo. 3*.

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Other objections were stated upon the motion; but as these arise only out of the *affidavits*, it is apprehended that they cannot be discussed.

Third point :  
Matters in affi-  
davits.

Sir *F. Pollock*, *F. Kelly*, and *Starkie*, contra.

The magistrates should follow precisely the language of the statute on which they profess to act (*a*). The words of which are (*b*), "when *it shall appear upon the view* of any two or more of the said justices" &c. Here, the magistrates do not say that it appeared to them upon their view, that the road was unnecessary, but say merely "having *upon view* found" &c., which is consistent with their having viewed it *separately*, or at some remote period of time, or of their having found the fact upon evidence given of a view by others.

First point.

The words "for the value thereof," should have occurred after the direction to sell to Mr. *Adeane*, if he should be willing to purchase, according to the form given in the schedule to 13 *Geo. 3*. The omission is material; *Davison v. Gill* (*c*).

Second p

In the schedule of 13 *Geo. 3*, next after the form of an "order for stopping up an old highway, and selling

Fourth  
No ce  
of sal  
highw  
appli  
mon  
from

(a) 55 *Geo. 3*, c. 68.

(c) 1 East, 64.

(b) *S. 2*.

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the land and soil thereof," is given a form (No. XIX.) for a "*certificate to be wrote under the order above mentioned*," which is as follows:—"We the above-named justices do certify, that the old highway hereinbefore mentioned and described, was sold by the said surveyor to —, with our approbation, for the sum of —, which sum we do order the said — to pay to the said surveyor, to be applied in purchasing that land and making the said new highway; and if any surplus remains, we do order that the same shall be applied for the use of the highways within the said (parish &c.) of —." And the next form is that of a "*receipt for the purchase-money*, to be indorsed upon or wrote under the certificate above-mentioned." Upon the order in question in this case, there is no such certificate or receipt, nor is there any direction as to the application of the money. On this ground also, it is submitted, the order is defective upon the face of it.

Third point.

Then with regard to the objections arising out of the statements upon the affidavits:—It may be shewn by *affidavit* that the magistrates *had no jurisdiction* to make this order, and that the order is therefore void; *e. g.* it might be shewn by *affidavit*, that the persons by whom it was made were *not magistrates of the county*, although stated to be such upon the face of the order.

In *Rex v. Standard-Hill* (a) it was held, that an appointment by two justices of overseers of the poor, may be removed into this Court by *certiorari*, without appealing against it to the quarter sessions, and this Court will go into the question upon *affidavit*, whether the place for which the appointment is made is a township or vill; and that if it appear by the affidavits that it is not, the appointment will be quashed. And in *Rex v. Great Marlow* (b), it was held, distinctly and after deliberation,


(a) 4 Maule & Selw. 378.

(b) 2 East, 244.

that affidavits may be read in support of objections of the want of jurisdiction, against appointments of magistrates, which upon the face of them are good. The principle of those cases applies here. Objections such as are now proposed to be moved against this order, may be taken *at the trial of an action* in which the validity of the order comes in question; *à fortiori*, they may be taken upon affidavits *upon an application for a certiorari*.

Upon the affidavits, three grounds of objection to the jurisdiction of the magistrates to make this order, appear.

**L. Mr. Adeane** was himself one of the surveyors of highways for the parish in which the road lay, at the time of making the order; and therefore the order contains a direction for him to sell to himself. It is a rule in equity, and also in law, that no trustee shall sell to himself (*a*). That principle applies here.

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Fifth point:  
 Waywarden,  
 himself vendee  
 of old road.

(*a*) "Nothing can be more just than the principles which govern a Court of Equity in relation to purchases made by the trustee of trust property. He pledges his honest endeavours to promote the interest of the cestui que trust by disposing of the property on the best terms which he can obtain; and equity will not permit him to create an interest in himself inconsistent with this pledge, and which may seduce him from an upright fulfilment of his duty. Whatever profit is gained by the sale belongs to the cestui que trust, and the trustee never can purchase or hold the property discharged of the equity of the cestui que trust to call upon him in a reasonable time to account for this profit or to have a re-sale. The purchase,

however, by the trustee, is not absolutely void, but voidable at the election of the cestui que trust, if he be dissatisfied with it, and in a reasonable time after a knowledge of the fact impeaches its validity. But if after such knowledge he confirm the sale, or unequivocally acquiesces in it, it will stand ratified by those general principles which prevail as well in Courts of Law as of Equity." Per *Washington, J.*, 1 *Peters's Rep.* 367, 368. See also *Davoue v. Fanning*, 2 *Johns. Chan. Rep.* 260. "The object of the rule is to keep trustees within the line of their duty, and it extends to buying securities upon the trust estate, as well as to buying in the estate itself." 1 *Johns. Chan. Rep.* 36; *Matthews v. Dragaud*, 3 *Desaussure*,

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Whether a di-  
version or a  
stopping up.

II. This order is in reality an order for a *diversion* of a highway, although it purports upon the face of it to

Chan. Rep. 26. See also *Munro v. Allaire*, 2 Caines's Ca. 192; *Arrowsmith v. Van Harlingen's Ex.*, Coxe's Rep. 26; *Parkist v. Alexander*, 1 Johns. Chan. Rep. 394; *Schieffelin v. Stewart*, ib. 620; *Quarles v. Lacy*, 4 Munf. 251. "There has been a difference of opinion in South Carolina with regard to the capacity of a trustee, having also an interest coupled with the trust, to become the purchaser of the trust property. The point was not determined in consequence of a division of the Court upon a particular circumstance of the transaction." *M'Guire v. M'Gowan*, 4 Desaussure, Chan. Rep. 486. "In another case a trustee, who had an interest to about one-fifth of the value, purchased the whole property, which he had obtained leave from the Court of Ordinary to sell, apparently at a full price. Two of the judges thought the sale ought to be set aside, on the broad principle of his incapacity to become a purchaser. A third concurred, because he thought from the facts of the case there was unfairness in the sale, but he was of opinion that having an interest, he might become a purchaser. The other two judges were in favour of the general authority to purchase." *Perry v. Dixon*, 4 Desaussure, Chan. Rep. 504 (in note). "There seem," says Chancellor *Desaus-*  
*sure*, in a subsequent case, de-

cided after a very long and laborious examination, in which most of the English cases were referred to, "to be two classes of decided cases on this subject; one where the relation of the parties is such that no contract can be permitted to subsist on any terms, if sought to be relieved against, as the case of attorneys dealing with their clients, or trustees selling to themselves: the other, where the relation of the parties does not interdict all contracts on the subject, but where, a confidence being reposed, the Court looks with a jealous eye at the conduct of the agent, and will set aside the contract if there be any considerable inadequacy of price in the transaction, and more particularly if there be any weakness or necessity in the vendor." *Butler v. Haskell*, 4 Desaussure, Chan. Rep. 702. "But cases, it has been said, where the trustee has procured the requisite formal legal title, are to be distinguished from those where the suit is by him to effectuate a purchase, either by having the thing purchased decreed to him specifically, or by having the means decreed to him whereby he may recover at law. In the latter case it seems that the rule, that a trustee can never be a purchaser, is to apply as unlimitedly as it is expressed; but that in the former case a Court of Equity will not always interfere,

der for *stopping up* an old highway, as useless necessary. The new road made by Mr. *Adeane*

se; for if the cestui or a majority of them, to allow the purchase, allowed without fear precedent." Per *Benson*, 193, 194.

distinction has been Chancellor *Kent*, who l the question on the iple." 2 Johns. Cha.

"Any person interest- apply, and set aside a trustee to himself." *et al. v. Fox*, 2 Hen. & ; "but a stranger will mitted to disaffirm it;" *Van Dalfsen*, 5 Johns.

"No principle, how- perty will invalidate the trustee to land, which has taken out of his d which he purchases appointed by the same to sell it. It is pre- the case of an executor ases at a sheriff's sale al property of his tes- ed and sold under exe- The reasons which for- ee from purchasing the erty, where he himself er, do not apply to such

1 Peters's Rep. 378. ian ad litem in partition fore be a purchaser at de by the commission- uant to an order of *Jackson v. Woolsey*, 11 p. 446. "No decision, upreme Court of Penn- has been shewn, that

where two or more executors sell lands openly and fairly, and another person buys them for one of them at a full price, such sale has been ruled void." *Eichelberger v. Barnitz*, 1 Yeates, 307. See also *Fuqua's ex. v. Young*, 4 Hen. & Munf. 430; 1 Desausure, Chan. Rep. 567. "What shall be deemed a reasonable time, within which the cestui que trust must apply to set aside a sale, is not susceptible of any definite rule, but must, in a degree, depend upon the circumstances of the case, and the sound discretion of the Court. In the case of *Butler v. Haskell*, eleven years were deemed a reasonable time; but the Court, in *Bergen v. Bennett*, 1 Caines's Ca. 1, refused the application after sixteen years. But length of time will in no case afford a presumption of acquiescence in a purchase, unless it appears that the cestui que trust had notice that the trustee had become the purchaser." 1 Peters's Rep. 370; Note to 3 Ves. 740, American edit.

And see *Whelpdale v. Cookson*, 1 Ves. sen. 9, more fully reported 5 Ves. 682; *Whichcote v. Lawrence*, 3 Ves. 740; *Lister v. Lister*, 6 Ves. 631; *James*, Ex parte, 8 Ves. 348; *Coles v. Trecothick*, 9 Ves. 234; *Bennett*, Ex parte, 10 Ves. 381, 385; *Sanderson v. Walker*, 13 Ves. 601; *Attorney-General v. Lord*

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was a substitution for the old road, and it was only by reason of such substitution that the old road was become useless and unnecessary. If this was in fact the case of a *diversion* of a highway, then the magistrates had no *jurisdiction* to make an order such as the present. *Welch v. Nash* (a) shews how cautious the Court has been not to allow roads to be stopped up, unless upon the express authority of the Legislature. [*Coleridge, J.* Does not that case shew that if the magistrates had no jurisdiction to make this order, you are not without a remedy, for that you may treat the order as a nullity?] Lord *Ellenborough* says, "The magistrates have only jurisdiction conferred on them in a given case: they may divert an old road so as to make it nearer or more commodious to the public, that is, by making a new road. The whole section contemplates that a new highway is to be made in lieu of the old one, which is to be stopped up; and the magistrates can only order the old highway to be stopped up on the condition that a new highway has been made and put in a proper state." *Lawrence, J.* says, "The justices cannot give themselves jurisdiction in a particular case, by finding that as a fact what is *not* the fact." The words of the 15th section are *divert or turn*, which certainly mean, altering the direction of the road. The 16th section forms a comment on the 19th, which it is difficult to get rid of, for the latter uses the words "diverted and turned," as different from "widened or enlarged," in the former section.

Seventh point:  
 Non-existence  
 of road at time  
 of view and  
 order.

III. The magistrates could not stop up the highway which they describe, for it has had no existence since the year 1825. The order should have been obtained in

*Dudley*, Cooper, 146; *Gregory*,  
 Ex parte, *ibid.* 201; *Downes v.*  
*Graybrook*, 3 Meriv. 200; *Cham-*  
*bers v. Waters*, 3 Sim. 42; *Fas-*  
*brook v. Balguy*, 1 Mylne & K.

226; *Whitcombe v. Minchin*, 5  
 Madd. 91; *Chalmer v. Bradley*,  
 1 Jac. & Walk. 59.  
 (a) 8 East, 394, 403.

whilst the road was in existence, and therefore of being viewed and stopped up.

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DENMAN, C. J.—This is an application for a writ to bring up an order of sessions confirming an order of three justices, for the purpose of quashing it. Objections are taken to the order for matters stated upon the face of it; and it is said also, that the order is void for want of full jurisdiction in the magistrates.

As to the objections to the order itself, the first is, that the words “having upon view found,” do not necessarily imply that the finding of the magistrates was upon their own view, or that that view was taken *in company*, or *when* the view was taken. In point of law, these objections would be well founded, if such were the right interpretation of the language of the order; and I wish to be distinctly understood as saying, that no view would be good unless it were taken by the magistrates *separately*, and that the finding must be the result of such separate views. It is very important that it should be understood that the magistrates are to act *together*. The language, however, which is here used, is precisely the same as that which occurs in the form given in the schedule to the 3. The legislature has declared these words to be sufficient.

The next objection is, that the words “for the full purpose thereof,” are not repeated. The *enacting part* of the statute has the expression *once* only in the same clause as in this order, whilst in the *form* given in the schedule it is *twice* repeated. I must own that it appears to me that the objection is not entitled to any weight.

The words at the close of the order are used in the same sense as in the clause of the act, and are intended to over-ride the whole of the preceding part.

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Then it is objected that there is no certificate written under this order. Upon looking' at the second act (*a*), it appears that the part of the former act (*b*), which requires the certificate, is repealed by a new enactment (*c*), respecting the appropriation of the money to be received from the sale of the soil. A certificate is not necessary, therefore, to give validity to the order.

On the face of the order, I am of opinion that there is no defect.

Third point. Then it has been contended that facts may be brought before the Court by affidavit, to shew that the magistrates had no jurisdiction to make the order; and upon the supposition that this course may be taken,

Seventh point. It is contended that the magistrates could not make the order to stop up a road which had *already* been closed; for that by the act of parliament they are required to *view* the road, in order to see whether it is unnecessary, and that such view should have been had whilst things remained as they were before the change which was made by Mr. *Adeane*. I do not think this argument just. It is not necessary that there should still be a road over which travellers may pass: it is sufficient that a *right* should be possessed by the public to go over particular land. If the magistrates find, upon view had at the time of making the order, that the road is useless, from whatever cause it has become useless, that is sufficient. Here, the road had become useless by reason of its having been stopped up by this gentleman, and a new one set out by him, and used by the public. I see nothing to object, on this ground, to the magistrates' making the order.

Fifth point. Then it is said that Mr. *Adeane* was himself surveyor of the highways of the parish, and that the order required

(*a*) 55 *Geo.* 3, c. 68.

(*c*) 55 *Geo.* 3, c. 68, s. 2.

(*b*) 13 *Geo.* 3, c. 78.

him to sell to himself. I do not mean to say that it would not have been better to have had the order made in some year when he was not surveyor, yet there is nothing in the act to prevent the surveyor from being the purchaser. I am not prepared to say that if *fraud* were manifestly made out, the Court would not, even in this proceeding, quash the order. From *Rex v. Great Marlow (a)*, it appears to be questionable whether the Court may not interfere in some cases on the ground of defects shewn by affidavit. But there is not the slightest ground for imputing any thing discreditable to Mr. *Adeane*. Upon the whole, I think the order good upon the face of it, and also upon the facts disclosed.

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PATTESON, J.—I am entirely of the same opinion. This order is on 55 *Geo. 3*, c. 68, s. 2, which says that two justices may stop up unnecessary highways, and sell and dispose of such unnecessary highways by such ways and means, and subject to such exceptions and conditions, in all respects, as in the recited act is mentioned in regard to highways to be widened and diverted, “except that the money to arise from such sale, when by the said act it would be applicable to the purchase of the ground and soil of the new highways therein mentioned, shall be paid to the surveyor, and be applied to the general repairs of the highways &c., of the parish &c., within which such highway so stopped up shall be situate.”

The order in question is drawn up, apparently, from two forms in the schedule to 13 *Geo. 3*, c. 68,—Nos. 16 and 18. In No. 16, the form is, “having upon view found,” as in the order in question. It is objected that the order does not shew that the road was found to be unnecessary upon the view had by the justices together,

(a) 2 East, 244.

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or upon a view had by themselves at all. In s. 19 of 13 Geo. 3, c. 68, the words are, "when it shall appear, upon the view of any two or more of the said justices of the peace." No doubt this means on the personal view of two or more justices viewing it together. Then what does the legislature say shall be the form in which such view shall be stated in the order "Having upon view found;" which we are bound to believe means "having upon our own joint view found," according to the directions of the section.

Second point. Then it is objected, that the words "for the full value thereof," should have been inserted after the direction to sell to Mr. *Adeune*, if he was willing. In the clause of the act the words occur only at the end, as in the order, and manifestly apply to the whole of that which precedes. But in the schedule, the words occur twice; and it is argued that the form in the schedule should be *closely* pursued. This, however, is clear, that the words in the clause and the schedule are intended to be *ad idem*. It is true that by the 69th section it is enacted, that the forms given in the schedule shall be used; but the same section provides that no advantage shall be taken of a defect of *form*.

Third point. Then, objections arising out of the facts in the affidavits are stated. I protest against its being understood as *laid down*, that we can, on any occasion, look into extrinsic matter upon affidavit, upon a rule for a certiorari to remove an order of sessions into this Court. I give no opinion upon the point. The general rule certainly is, that where any thing is brought up by certiorari, no objection can be taken which does not arise upon the face of it. Here, the objections which have been taken might have been brought before the quarter sessions. However, supposing there were not such a rule, and that we could look into the affidavits, as it has been contended, I can see no valid objections to this order.

The road had been stopped up for ten years without any proper authority, and this it is said merges, if I may use the term, the power of the justices to stop up. I dare say, that when the magistrates went to view they could not see the *actual road* in length and breadth, but they may, at all events, have seen the *line and direction*. The magistrates' saying that they had viewed, is sufficient. If the road existed in point of *law*, that is enough.

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Seventh point.

But then it is said that this was in fact a *diversion*. I see nothing in this act to prevent a private person, through whose land a road runs, from setting out another road, letting the public use both perhaps for a while, and then calling upon justices to stop up the old road as unnecessary. If the magistrates stop up an old road, when they ought not, the parties aggrieved may appeal to the sessions.

As to Mr. *Adeane's* being the surveyor, that is clearly no ground of objection to the order. There is nothing to shew that all was not done fairly and honestly. If it had been shewn to be otherwise, that would have been matter for the sessions, not for this Court.

It was also objected, that nothing is said in the order as to the application of the money to be paid for the soil of the highway. In the Forms Nos. 16 and 18, nothing is said about the application of the money, but a form of a certificate to be written underneath the order is given. The certificate is done away with by the part of the statute (55 Geo. 3, c. 68, s. 2,) which directs that the money to be paid for the soil of the unnecessary road, shall be applied to the *general fund* for the repairs of the highways of the parish.

I feel strongly, that the Court cannot enter into the question, whether the magistrates have done rightly in making this order; but supposing that we may look at

Sixth point.

Fifth point.

Fourth point.

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venth points.

these affidavits, I see no ground for saying that the magistrates have acted without full jurisdiction.

WILLIAMS, J.—The most important question is, as to how far we can, on affidavit, go into the question whether there was a total absence of jurisdiction; but upon this point I give no opinion. Here, it is *not* made out that the magistrates were wholly without jurisdiction. The road may, at the time of the view, have been converted into arable land, but still it remained sufficiently a road to found a jurisdiction in the magistrates to stop it up. The case of *Welch v. Nash (a)*, which was relied upon by Mr. *Starkie*, unquestionably leaves it open to parties to question the jurisdiction *in an action*, but it goes no further.

First point.

Objections are made to this order as arising upon the face of it; and the first objection is, as to the words "having upon view found." We must read these expressions in the ordinary way. We must not make a violent construction in favour of it; nor must we force it into nonsense. It must be taken to mean that the finding was upon the joint view of the justices who make the order.

Second point.

The other objection is, that the words "for the full value thereof," are not repeated. Upon this, I agree with the rest of the Court. Independently of observations upon the act itself, the rule is, that we must give a fair construction to the language used, and accordingly these words must be referred to the whole of the previous part of the order.

Sixth point.

The objection, that Mr. *Adeane* was himself surveyor, does not arise upon the face of the order.

COLERIDGE, J.—I am of the same opinion. Two

(a) *Ante*, 344.

s of objections have been taken, namely, objections  
g out of matters not on the face of the order, and  
tions arising upon the face of it. The former ob-  
ns raise by far the most important question.

lways understood it to be perfectly clear, that upon  
plication of this sort we cannot go into objections  
g upon *affidavit* only. I do not mean to say, that  
case will this Court, when any thing is brought  
certiorari, inquire into its validity upon affidavits,  
some cases this Court is in the nature of a court  
peal; and then we must see the merits upon affi-  
s. This Court checks other Courts from trans-  
ng beyond the bounds of their jurisdiction; and we  
d be careful that ~~we~~ keep within the limits of our  
iction. When the Court below has a conclusive  
iction, we ought not to inquire whether it has de-  
rightly.

is order might have been open to three sorts of  
tions. First, it might have been inconveniently  
justly made; and thus would form the subject of  
peal to the sessions. Secondly, it might have been  
without jurisdiction; and then the order would be  
nd void, and the validity of it might be tried in an  
of trespass; and this Court could not therefore  
ere. Thirdly, it might have been bad upon the  
of it, and then it would be proper that it should  
ought up to be quashed.

this order was made without *jurisdiction*, I think  
innot, upon affidavits, interfere. The more strongly  
tions on the ground of *inconvenience* are pressed,  
ore are we pressed not to interfere; for this is a  
r for the sessions, which we must assume they  
decide rightly. I say nothing of the particular ob-  
ns which have been raised upon the affidavits; for  
ok I cannot go into them.

L. III.

A A

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Third point.

Three distinct  
modes of ques-  
tioning the va-  
lidity of order,  
according to  
the class to  
which the ob-  
jection be-  
longs.

Third point.

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- First point. The objections arising upon the face of the order are two. First, as to the expression "having upon view found." This is an expression, the meaning of which is well known amongst lawyers, and in using which, the justices must be taken to mean to say "We, the justices &c., having viewed, do find," &c.
- Second point. Then, as to the objection that the words "for the full value thereof" are not repeated:—the legislature, in the very section upon which this part of the order is founded, use the expression once only. Can we then say that it is not sufficient to use it once, as here in this order. I think that we certainly cannot do so.
- Fourth point. It was objected also, that there is no direction as to the application of the money. The form in the schedule to 13 *Geo. 3*, c. 78, certainly contains directions as to the application of the money. That was a necessary part of the order then, because the money was to go to a specific fund; but by 55 *Geo. 3*, c. 68, the money becomes part of the general fund for the repairs of the highways of the parish or other district.
- The certificate of the sale never can come concurrently with the order for sale, but must be subsequent to it.

Rule discharged with costs.

1833.

ING v. The Inhabitants of the Parish of WOOLPIT.  
in the County of Suffolk.

N appeal against an order for the removal of *Brown* and his wife from the parish of Woolpit parish of Haughley, the sessions quashed the subject to the opinion of this Court on the following:

pauper's present wife, then *Mary Ann Pilbrow*, repugnant by him before marriage. *M. A. Pilbrow* time lived at Woolpit, and the pauper in the house of the incorporated hundred of Stow. The of Haughley is in the hundred of Stow, but the of Woolpit is not. *Mary Ann Pilbrow* having d the pauper with having gotten her with child, per was, on 21st October, 1833, apprehended by *Edsall*, a constable of Woolpit, and on the 22nd ken by him before a magistrate. On the same ctober the pauper was committed by the magis- for want of sureties, to the county gaol at Bury mund's. About the beginning of November, w, the father of *Mary Ann Pilbrow*, became for the pauper; and the pauper returned imme- from Bury to Woolpit. On the pauper's coming olpit, *Pilbrow* took lodgings for him at Woolpit

In order to constitute a "coming to settle" within 13 & 14 Car. 2, c. 12, the party must have come into the parish animo morandi or residendi; but it is not necessary that he should have come with an intention to reside permanently.

The residence intended need not be for such a time and under such circumstances as would, at the time of passing of 13 & 14 Car. 2, c. 12, have conferred a settlement. Per *Patteson*, J. and *Williams*, J.

*Secus*, *semble*, per *Cole-ridge*, J.

Whether a party came to settle within the meaning of 13 & 14 Car. 2, c. 12, question of fact, to be decided by the sessions alone. Where, upon a case stating the facts, the sessions find in the negative, this will not interfere with that finding, unless they see that upon the facts stated the finding is necessarily wrong.

Sessions found that *A.* hired and paid for lodgings for the pauper in Dale,—the pauper came to Dale, and resided in the lodgings for a week, married, and afterwards to reside in the lodgings until his removal under the order against:—Held, per *Patteson*, J. and *Williams*, J.—dissentiente, *Cole-ridge*, J. a finding by the sessions that the pauper did not come to settle in Dale the meaning of 13 & 14 Car. 2, c. 2, was repugnant to the facts found, and therefore necessarily wrong.

In all cases from the sessions should be drawn by counsel.

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with one *Howe*, upon terms agreed upon between *Howe* and *Pilbrow*; and *Pilbrow* subsequently paid *Howe's* charge for the lodgings. The pauper having resided about a week in the lodgings procured for him by *Pilbrow*, on 12th November, at Woolpit, married the said *Mary Ann Pilbrow*, his present wife. He continued to reside in the same lodgings until he was removed, on the 20th November following, by the order of two justices, to Haughley. The pauper was relieved by the parish of Woolpit after his marriage; but there was no evidence that the parish had been put to any expense either by his lodgings or his marriage. The respondents' counsel offered to prove the pauper's settlement in Haughley, but the appellants' counsel insisted on resting their case on the irremovability of the pauper, on the ground that he had not come to inhabit in the parish of Woolpit. The sessions quashed the order, on the ground that the pauper had not come to inhabit in Woolpit within the meaning of the statute 13 & 14 Car. 2 (a).

First point:  
 What a  
 coming to  
 settle.

*Biggs Andrews* and *Austin* in support of the order of sessions. The pauper was not removable, because he did not, in the words of 13 & 14 Car. 2, *come to settle* in the parish of Woolpit (b). Section 1 of that statute,—after reciting that, by reason of some defects in the law, poor people were not restrained from going from one parish to another, and therefore did endeavour to settle themselves in those parishes where there was *the best stock*, the largest commons or wastes to build

(a) This case was signed by the chairman of the Suffolk Quarter Sessions and by the clerk of the pence, but not by counsel.

(b) *Andrews* was about to dis-

cuss the effect of 35 Geo. 3, c. 101; but the counsel for the respondents admitted that they could found no additional argument on that statute.

cottages, and the most woods for them to burn and destroy; and when they had consumed it, then to another parish, and at last became rogues and vagabonds, to the great discouragement of parishes to provide stock where it was liable to be devoured by strangers,—enacted that it should and might be lawful, upon complaint made by the churchwardens or overseers of the poor of any parish to any justice of the peace, within forty days after any such person *coming so to settle as aforesaid* in any tenement under the yearly value of 10*l.*, for two justices of the peace of the division where any person that was likely to become chargeable to the parish should come to inhabit, by their warrant to remove such person to such parish where he was last legally settled. The mere fact of a man's being chargeable to a parish in which he is for the time being, is not sufficient to give the justices jurisdiction to remove him to the place of his last legal settlement. He must have come into the parish *animo morandi* or *manendi*, and with an intention to consume a portion of the stock of the parish. Here, no intention to remain or to consume the parish stock appears. The pauper came into the parish rather as a visitor to *Pilbrow* than as intending to settle there. The pauper came into Woolpit immediately upon *Pilbrow's* becoming surety for him. The lodgings, in which the pauper resided for a week before his marriage and a week afterwards, were both taken and paid for by *Pilbrow*. Suppose the pauper had resided during that time as a *guest* in *Pilbrow's* house,—could that be said to be a coming to settle in Woolpit? It is submitted that it could not. What difference is there between such a case and the present, in which the lodgings were probably taken owing to the smallness of *Pilbrow's* own residence? *Rex v. St. James, in Bury St. Ed-*

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Second point:  
"Coming to  
settle in a  
parish" to be  
decided by  
the sessions.

Whether there was a coming to settle, is a question of fact to be decided by the sessions. The sessions have in this case found that the pauper did not come to settle; the question has been decided by the only competent authority.

The Court will, if it can possibly do so upon the facts stated, support the finding of the sessions.

Second point. *Byles and J. W. Smith, contra. [Coleridge, J. The difficulty in my mind is, that the coming to settle is a conclusion to be drawn from all the circumstances of the case; and if the sessions have decided the question one way, we cannot interfere, unless the decision appears clearly to be without any foundation.] The sessions found that the pauper returned from Bury to Woolpit,—and "returned" is tantamount to "came;" that in the pauper's coming to Woolpit, Pilbrow took lodgings for him,—which was a preparation for residence; that the pauper resided in the lodgings a week, and then married; and that he continued to reside until his removal. The sessions have therefore found that the pauper came and resided in Woolpit. "Reside" is synonymous with or even stronger than "inhabit;" and "come to inhabit" is used, in the statute of 13 & 14 Car. 2, synonymously with "come to settle." Coming to reside is therefore the same thing as "coming to settle;" and as the sessions have found that the pauper came and resided, (which is even stronger than coming to reside,) they*

(a) 10 East, 25.

(b) 4 Maule & Selw. 357.

(c) 4 Barn. & Ald. 660.

(d) 6 Dowl. & Ryl. 269; 4

Barn. & Cressw. 230; 3 Dowl.

& Ryl. Mag. Ca. 137.

have themselves negatived their own conclusion that the pauper did *not* come to settle. In reality, the sessions have not found as a fact that the pauper did not come to settle. Their conclusion is intended to be a conclusion of *law*; and the question intended to be submitted by them was, whether they were right in saying that in point of law there was no coming to settle *within the meaning of the statute*. In the several cases which have been quoted, the Court treated the question as one of law. In each case, as indeed must always necessarily be, the sessions decided one way; and if the question had been considered by the Court as a question of fact, the Court would not have entered, in the manner in which they did, into the inquiry whether the conclusion drawn by the sessions was correct. So, with regard to *Rex v. Birmingham (a)*. In the ordinary case of a settlement by hiring and service, the sessions, by quashing or confirming the order of magistrates, always decides that either there was or was not a hiring and service sufficient to confer a settlement: yet this Court never refuses to review the decisions of the sessions in such cases.

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But further, the finding of the sessions that the pauper did not come to settle within the meaning of 13 & 14 Car. 2, is so clearly and manifestly wrong, upon the facts stated, that the Court will not support it. The act of 13 & 14 Car. 2 authorizes the removal of the person coming to *settle* to such parish where he was last legally *settled*, either as a native householder, *sojourner*, &c.; so that the statute contemplates a person being *settled* in a parish in the capacity of "sojourner," i. e. of "temporary resident," as it is defined by Dr. Johnson. In *Rex v. Helsham (b)* Lord Tenterden says, "There is no authority to shew that the original intent of the

First point.

(a) 14 East, 251.

(b) 2 Barn. & Adol. 625.

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party must be absolute and unqualified to continue for forty days; and I am unwilling to introduce a new term or condition to the gaining of a settlement by coming to settle on a tenement." "It has been properly observed (said his lordship) that the recital in the 13 & 14 *Car. 2* does not import a permanent intent, but applies only to persons coming to settle for a short time." All the authorities cited *contra* are distinguishable on one broad ground, viz. that in each case the pauper remained in the removing parish *animo invito*, or at least plainly *without* any intention to settle. In *Rex v. St. James, Bury St. Edmund's* (a), the pauper was detained in the removing parish owing to his breaking his leg at a time when he was preparing to leave the parish. In *Rex v. St. Lawrence, Ludlow* (b), the pauper, having fractured his thigh in an adjoining parish, was brought into the removing parish to be cured. In *Rex v. Ashton-under-Lyne* (c) the pauper came into the removing parish for the purpose of escaping the pursuit of justice: he came *animo latitandi*, and not *residendi*. Here the party came into Woolpit of his own free will, with the intention (as it must be assumed in the absence of any negation of that fact) of residing in it. Whether it was his intention to reside for a temporary purpose or for a permanency is immaterial. In *Rex v. St. James, Bury St. Edmund's*, Lord *Ellenborough* says, "The expression of *coming to settle* denotes that the party comes *animo morandi* or *manendi*: it may be for a temporary purpose."

PATTESON, J. (d)—It appears to me that the real question (and upon this the Court do not altogether agree)

(a) *Ante*, 356.

(b) *Ibid.*

(c) *Ibid.*

(d) Lord *Denman*, C. J., was absent on account of severe indisposition.

is, whether we are concluded by the finding of the sessions. If we are concluded by the finding, that the pauper did not come to settle, then we have nothing to do with the matter, and it was absurd and ridiculous to send the case for our opinion. If, upon the statement of the case, it appears that the sessions have found what is perfectly contradictory; if, according to my construction of this statement, they show that the pauper did come to settle, and afterwards say that he did not, the intention must have been to submit to us a question of *law*;—wrongly, I believe. I do not see that we are absolutely precluded from entering into the inquiry, the more especially, as, in my view, the finding of the sessions, that there was not a coming to settle within the meaning of the statute of *Charles*, is contrary to the tenor of all the authorities. The sessions find, that the pauper, being in the Stow workhouse, had a child sworn to him by *Pilbrow's* daughter, and was, for want of sureties, committed to Bury gaol; that *Pilbrow* became surety, and the pauper came (or *returned*, as the sessions improperly say,) immediately from Bury to Woolpit; that on his *coming* to Woolpit, *Pilbrow* took lodgings for him, and he resided in them until removed. The pauper came into Woolpit entirely of his own accord; he was not brought there, *animo invito*, by any one. I do not see how it is possible to say that the sessions have not found that the pauper came to reside in Woolpit. In *Rex v. Helsham*, the Court held distinctly, that the pauper need not have come into the parish with an intention to reside permanently. And indeed this is quite plain; for the preamble to the enactment in 13 & 14 *Car. 2*, contemplates the case of persons that *go about* from one parish to another. It strikes me at present, that if any man comes under any circumstances, except such as those in *Rex v. St. Law-*

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*rence, Ludlow, and Rex v. St. James, Bury St. Edmund's*, for the purpose of inhabiting in that parish for any length of time, it would be a coming to settle within the meaning of the act. I do not even say, that the circumstances must be such that he would gain a settlement by forty days' residence. Even though the party comes as an inmate of another man's house, yet if he comes *animo morandi*, that would, as it seems to me, be a coming to settle. The sessions have here stated the fact, distinctly to my mind, that the pauper came to Woolpit for the purpose of inhabiting or residing. Then with respect to the cases cited: *Rex v. St. Lawrence, Ludlow, and Rex v. St. James, Bury St. Edmund's*, have nothing to do with the case before us; for in both those cases the pauper did not *come* to the parish at all, but was, in fact, *cast* there by accident. In *Rex v. Birmingham*, the pauper was taken by the overseer of Inkberrow, without any order, to the parish of Fakenham, and was kept there by the threats of the officers of the parish of Fakenham, that they would send her to prison if she returned to Inkberrow. Yet it was held, that she was removable from Fakenham to the place of her settlement. *Rex v. Birmingham* has certainly been somewhat shaken by the observations of Lord *Tenterden*, in *Rex v. St. Lawrence, Ludlow*; but without going the full length of that case, it is certainly a strong authority to shew, that in such a case as this,—which is very distinguishable, and much stronger, because the pauper came of his own accord into Woolpit, and resided there voluntarily,—there was a coming to settle, so as to make the pauper removable.


The whole question is, whether or not we are concluded by the finding of the sessions. I think not; because on the face of the case, I think they have found

the fact, that the pauper *did* come to settle, and afterwards that he *did not* come to settle, within the meaning of the statute; intending to submit to us a question of law.

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WILLIAMS, J.—I am of the same opinion. I will not pretend to say, whether it would have been well if the Court had always uniformly held, that when a question of fact was found by the sessions, they would, under no circumstances, enter into an examination of the correctness of that finding. It is now infinitely too late to entertain any doubt but that they will, under some circumstances, interfere. The books are full of cases in which the question, being one of fact, and the sessions having found it one way, this Court has nevertheless, when the circumstances have been stated in a special case, examined the grounds of the decision of the sessions, and have reversed their finding. What is more a question of fact than that of fraud? None. Yet the Court has examined into, and reversed, the decision of the sessions on a question of fraud. And so, over and over again, in other cases which are as clearly questions of fact. So long ago as the time of Lord *Hardwicke*, I find it was said, “If they (the sessions) had *generally* found the fraud, we might have been bound by such a general finding; but when they state the facts particularizing matter, the matter is as much for our determination as it was for their’s (s)”; and accordingly the Court did enter into the grounds of their decision. And in *Rex v. St. Mary-the-less, Durham*(b), the sessions having found the fact upon a question of occupation, *Law and Chambre*

(a) *Per Lord Hardwicke, C. J. Rowe v. Huntington*, Vaugh. 66, in *Rex v. Tedford*, Burr. S. C. 77.  
57. So, in a special verdict, (b) 4 T. R. 479.

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relied on the conclusion of fact. What says Lord *Kenyon*—peculiarly conversant with sessions, as with all other law?—"If the sessions had confined themselves to the finding of the fact of occupation on the face of their order, the consequence stated would have followed; but that is the very question which they have left for the decision of the Court." And the Court, in that case, entered into the inquiry as to the occupation;—and for very good reason, because it was perfectly plain that that was the point about which the sessions had doubt, and to have the opinion of the Court upon which, they stated the case. For what purpose have the sessions stated the case here? For no other purpose, that I am aware of, than to have the opinion of the Court, as to whether the pauper was, in point of law, removable. The sessions might, if they had thought proper, have contented themselves with acting upon the impression that the pauper was not removable; but having stated the facts in a case sent for our opinion, we are bound to examine the ground upon which they have decided, and to come to a conclusion upon them. I cannot entertain the slightest particle of doubt on the question submitted. "Coming to settle," does not mean a coming to settle under such circumstances, that, if the duration were long enough, the party would gain a settlement. It merely means a coming to inhabit; for how long? Is it to be for a week, month, or year? There is no case to shew for how long it must be intended to inhabit. There is nothing in this case to limit or restrict the generality of the intent as to the duration of the residence of this party. It is stated generally, that the pauper came to Woolpit, and that lodgings were taken for him, not for any limited period, but generally. If the pauper intended to stay only for a limited period, that fact should have been shewn by

the appellant. As the matter stands, the purpose as to the duration is entirely unexplained. The cases which have been referred to, negative any thing like a coming for the purpose of residing. The *deserter* did not stay one hour for the purpose of residing. So with the men with the broken legs. On the whole facts, the statement of the sessions appears to me to lead to the inevitable conclusion that the pauper was coming to settle indefinitely, and not for any limited or restricted period. As the sessions have stated the facts, we are at liberty to inquire into them, and I think that, upon those facts, there is not one particle of foundation for the finding of the sessions.

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COLERIDGE, J.—It is with very great regret that I have found myself not able to concur with my brothers. I say it quite unfeignedly, that I have little doubt but that I am in error; still I am bound to state the opinion which I entertain. I have this satisfaction, that I do not think that we shall be found to differ much *in principle*. As to what this Court *has* done as to questions of fact in settlement cases, most lawyers are of opinion that this Court has often, from a desire to do justice between the parties, and at the particular request of the sessions, gone out of its province, and has adjudicated upon matters of fact, which, no lawyer will doubt, ought to have been left to the sessions. As this course is not a correct one, we ought to be careful not to advance it. The general rule ought to be, that where the sessions have found the fact, we should not interfere with their finding unless we see that the sessions have come to a conclusion entirely without foundation, or decidedly contrary to the weight of the evidence,—in which case we might, by analogy to the practice of the Court with regard to the verdicts

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of juries upon questions of fact, interpose. The province of a jury is to find the facts one way or the other; and the Court will not in general interfere with their finding; but it has become an inveterate practice for the Court to say that the jury have done wrong, if they have come to a conclusion quite contrary to the evidence. Then, I ask myself, whether, in this case, the question is one of fact or of law? In all the cases it has been treated as a question of fact, whether the Court has agreed or disagreed with the finding of the sessions. Whatever may be the meaning of the expression, "coming to settle," we may start with this,—that whether or not a party comes to settle, is a question of fact. This has not been much controverted, either by the bench or the bar. Then, if this be a question of fact, have the sessions come to a conclusion? and if they have, have they submitted that conclusion to the Court? or if they have not intended to submit that conclusion, is it clearly wrong?—When I read the case, I cannot doubt (except by reason of one of my brothers having come to a contrary opinion) that the sessions have come to a conclusion of fact, whether their conclusion be right or wrong. I find certain evidence stated, a point taken, and the sessions acting upon it, and saying that they quashed the order because they believed that the pauper did not come to inhabit within the meaning of the statute. The sessions have drawn that conclusion. Then, have they drawn a conclusion *necessarily* wrong? I admit, that if they have, we are bound to revise their decision? Now what are the facts? The pauper being discharged from Bury gaol, upon *Pilbrow's* becoming surety for him, immediately came to Woolpit; and this is an ambiguous act, for he may have come either to reside or pass through. He took no house, but lodgings were taken for him by *Pilbrow*, and he resided in

them for a week, married, and resided afterwards until his removal. These are all the facts. Then I ask myself, whether it is a *necessary* conclusion, from the facts stated, without more, that the pauper came to reside? It is said, that if he did not come to reside, something negating the intention to reside ought to have been stated. I cannot agree to that; for the respondents came to justify their order, and a necessary part of their justification is, that the pauper was removable at the time of making the order. The affirmative, with respect to the animus residendi, lies therefore upon them; just as it lies upon them to prove affirmatively, that the pauper was *chargeable*. It would be monstrous to say, that chargeability must be inferred from the absence of negative proof. If the fact of the intention to reside is to be made out at all, it must be made out by the respondents. Then, I ask again, is it a *necessary* conclusion, from the facts stated, that the pauper came to reside? I think not. Minds are differently constituted; and I think it very possible for different minds to draw various conclusions from these facts. I do not say, that if the question were put to me as a question of fact, whether the pauper came there to reside, I should not have held that he did come to reside. It may be that he did come to reside, but I think that is not a *necessary* conclusion. *Rex v. Chediston* differs so much in the facts as to be no authority in this case; and, indeed, the point in issue here was not raised in that case. *Rex v. Birmingham* is, I think, an authority by which the Court ought not to be bound. I fairly say so. The negative of the animus is so strong there, that I think it impossible to support the conclusion. The judgment of Lord *Ellenborough* is very short, and his whole attention appears to have been directed to a somewhat

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different point. I was very much struck with the very able argument of *Mr. Smith* upon the words of the statute. I do not say that there is any necessity for any intention to reside permanently; but upon looking at the whole of the preamble and enactment in the statute of the 13 & 14 *Car. 2*, I think it must appear to any one that the party must come to settle with the intention of acquiring a right to some portion of the *stock* of the parish. I do not think that the mere coming to reside in the house of another, merely as an inmate or guest, would be sufficient.

I cannot see here that the sessions are clearly wrong, and therefore, I think, that we cannot interfere with their conclusion.

PATTESON, J.—The case should go down again to the sessions: the order of sessions to be quashed, and the sessions to enter continuances and hear the appeal again. The Court agree that the coming to settle *animo morandi* is a question of fact.

COLERIDGE, J.—It is much to be regretted that special cases from the sessions are not always drawn by counsel.

Order quashed, but the case to be re-heard by the sessions.



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## The KING v. The Inhabitants of GREAT WISHFORD.

UPON appeal, an order for the removal of *Thomas Harman* and his wife from Kidderminster to the parish of Great Wishford, Wilts, was confirmed, subject to the following case.

The pauper's father being settled in Great Wishford, died in 1818, and in 1823 the pauper's mother applied to one *West*, a carpet-weaver at Kidderminster, to take the pauper into his employment. *West* agreed with the mother to take the pauper on trial for two years, after which, if the pauper and *West* agreed, the pauper was to be apprenticed. The pauper was to be found in board, lodging, and washing by *West*, but was to have no wages, except what *West* pleased to give him as pocket money. The pauper *was to draw*. The pauper went to *West* as agreed, and worked for him for about a year and a half, living in *West*'s house in Kidderminster during that period. The pauper then ran away from Easter to wheat harvest, when he returned and worked for *West* for a short time at weekly wages, when he again ran away, and they parted. It was stated by a magistrate on the bench, and assented to, that every carpet-weaver is first taught the art of drawing *as a drawboy*. The chairman took the opinion of the Court, whether the service was under an imperfect contract of apprenticeship, or a hiring and service: and the Court found that it was an imperfect contract of apprenticeship (a).

(a) The case was drawn up by the chairman of the sessions, as *the counsel could not agree on the facts to be stated for the opinion*

It is not necessary that the precise words, to teach or to learn, should occur in the agreement, to constitute it a contract of apprenticeship.

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*F. V. Lee* (and *Merewether Turner* was with in support of the order of sessions. The question for the consideration of the Court is, whether the contract was one of imperfect apprenticeship or of hiring and service. The sessions having found that it was a perfect contract of apprenticeship, and as there are no facts to justify that finding of the sessions, this Court will question it, however slight the facts upon which the finding is founded may appear to them to be; *Rex v. Edingale*. It clearly appears on this case, that it was the intention of the parties that the pauper should be apprenticed to *West*. It was agreed that the pauper should be apprenticed, *i. e.* apprenticed in due form, after the two years if *West* and the pauper agreed, and it was stipulated that the pauper should at once *draw*, which appears to be the first step in learning the business of a weaver.


In *Rex v. Edingale*, a pauper applied to a master to take him as an apprentice, and the master said he would not, because, if he did, he should offend the farmer who would take him on agreement for four years; and afterwards it was agreed between the master and the pauper's step-father that the pauper should serve the master four years, to learn his trade, to have meat, washing, and lodging for the whole time, and 2s. 6d. a week the last two years: Held, that the principal intention of the parties being that the pauper should learn the trade of the master, it was a contract of apprenticeship and not one of hiring and service. Applying the

of the Court. It appears to be the duty of counsel to take care, that as well all material facts given in evidence as the inferences of fact to be drawn from the evidence, are found by the justices, and that those facts

and inferences are duly set down. When the special verdict drawn by counsel, their duties must be considered guaranteeing that this has been done.

(a) 10 Barn. & Cressw.

to the present case, it is quite clear that this is an imperfect contract of apprenticeship, since the object of the parties evidently was, that the pauper should be taught the trade of the master. [*Patteson*, J. It is sufficient for you to negative that this was a contract of hiring and service. Taking a party on trial does not imply a contract of hiring and service.]

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The Court then called upon the counsel on the other side.

*W. J. Alexander* and *Whitmore*, contra. This is a case in which the finding of the sessions is contrary to the facts stated in the case. Upon the facts stated, the sessions have drawn a conclusion manifestly wrong. The Court will therefore not feel itself bound by the finding; *Rex v. Woolpit* (a). In every case where the order of sessions is quashed, there is a reversal of a finding of the sessions. In *Rex v. Tedford* (b), a finding of fraud by the sessions was reversed. In *Rex v. St. Margaret's, King's Lynn* (c), the sessions found that a contract was a contract of hiring and service, yet this Court being of opinion that, upon the facts stated, the contract between the parties appeared to be an imperfect contract of apprenticeship, reversed that finding. *Rex v. Crediton* (d), and *Rex v. Newtown* (e), are also instances in which this Court reversed the finding of the sessions; and numerous other similar cases might be adduced. It is manifest, upon reading the case, that it was intended to submit to the consideration of this Court, the questions—whether the contract was an im-

(a) *Ante*, 353.

6 Barn. & Cressw. 97.

(b) Burr. S. C. 57.

(d) 2 Barn. & Adol. 493.

(c) 2 Mann. & Ryl. 39; S. C.

(e) *Ante*.

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perfect contract of apprenticeship, or whether it was a contract of hiring. Both questions are therefore within the cognizance of this Court. The very circumstance of granting a case shews, that the finding was not intended to be conclusive, but that the whole question was intended to be submitted to the consideration of this Court. It is therefore open to discussion, whether this is a contract of hiring or of apprenticeship.

This was a contract of hiring and service. In *Rex v. Hitcham*(a), the pauper let himself to his brother, who was a carpenter, for a year. He was to receive no money by way of wages, but his brother was to teach him as much as he could of the trade during the time, and provide him with meat, drink, washing and lodging; the pauper to do all his brother's lawful business in his farming way. This was held to be a contract of hiring. *Rex v. Edingale* is distinguishable; for there the object of the parties expressly appeared to be for the master to *teach* and the apprentice to *learn*. So in *Rex v. St. Margaret's*, *King's Lynn*(b), *Rex v. Newtown*(c), *Rex v. Crediton*(d). In this case there was no engagement on the part of the master to *teach*; no premium is paid; no written instrument is executed. There are no words of *instruction* in the contract, and there is no instance in which the Court have held the agreement to be a contract of apprenticeship where words of *instruction* were wanting. The very arrangement for a *future* apprenticeship, excludes the supposition of there being a *present* contract of that description. [*Coleridge, J.* The pauper was to go two years on trial. The trial might end at the expiration of a month.] Then the hiring was conditional, and as there was a service for a year, a settle-

(a) Burr. S. C. 498.

(b) *Ante*, 369.

(c) *Ibid.*

(d) 2 Barn. & Adol. 493.

ment was gained. But the true construction of the contract is, that the trial was to continue for two years. The pauper was, by the contract, to *draw*; but it does not appear that he had not *previously* been taught to draw, nor was there any *contract* on the part of the master to teach him to draw, if in fact he was then ignorant of the art. It was merely incidental to the service.

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PATTESON, J. (a).—In this case the sessions have, in my opinion, found that this was not a contract of hiring. The chairman says, in the statement made by him, that he took the opinion of the Court, “whether the service was under an imperfect contract of apprenticeship, or a hiring and service.” The question was therefore put in the alternative, and the Court found that the service was referable to an imperfect contract of apprenticeship. They must therefore be taken to have negatived that it was referable to a hiring and service. There are two grounds on which the counsel for the respondents contend that the order of sessions should be confirmed. First, that the sessions have found that this was an imperfect contract of apprenticeship, and that we are concluded by the finding of that Court; and secondly, that the finding is right. The line of demarcation between the cases, where this Court is concluded by the finding of the sessions and where not, is not very clear or distinct. But this is clear, that in no instance has this Court reversed the finding of the sessions, unless they have seen that the sessions have manifestly come to a wrong conclusion upon the circumstances stated. I was pressed with the case of *Rex v. Woolpit*, decided on Saturday last, in which there was some difference of opinion on the bench. My brother *Williams* and I

(a) Lord Denman, C. J. was absent, on account of severe indisposition.

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thought that the finding of sessions was contradictory, and that therefore we could enter into the question sent up by them for the opinion of this Court. My brother *Coleridge* thought that this Court was concluded by the finding. We did not, however, differ in principle, but only in our view of the circumstances stated. In this particular case we are, I believe, all agreed that the sessions have come to a conclusion in which they were warranted by the circumstances of the case. The contract is capable of two constructions. It may be either a contract of hiring and service, or a contract of imperfect apprenticeship. *Bayley, J.*, in *Rex v. St. Margaret's, King's Lynn*, says, "Every case of this description must depend upon its own particular circumstances. If, from all that passed between the parties at the time when the contract was made, they appear to have contemplated the relation of master and apprentice, then the contract must be considered one of apprenticeship. If, on the other hand, it appears that the parties contemplated the relation of master and servant, then it must be deemed a contract of hiring; and a settlement will be gained by serving under it." The test adopted in that case was, whether the parties appear to have contemplated "the relation of master and apprentice." In *Rex v. Crediton* and *Rex v. Newtown*, the test adopted was, whether the parties contemplated "teaching and learning." The law, I apprehend, now is, that the Court of Quarter Sessions are to look to all the circumstances of the case, and determine whether the contract is one of hiring and service or of imperfect apprenticeship. I confess I should have determined the case in the same way as the sessions have done. But it is sufficient that the sessions were warranted in coming to the conclusion which they have drawn. There was to be a teaching by the master of the business of a weaver. The pauper

was to go for two years on trial. That might mean either that the pauper was to go as an apprentice on trial, or that he was to be a servant for two years absolutely, and that if the parties liked each other at the expiration of the two years, the pauper was to be then apprenticed. The sessions were the proper tribunal to decide what was the meaning of the parties. The inclination of my opinion is, that the contract was an improper apprenticeship. We are pressed with the argument that if the sessions intended to find the fact that this was an imperfect contract of apprenticeship, they would not have granted a case. I do not feel the force of that argument, because I know that the sessions do frequently send a case even where they entertain no doubt upon the facts; and this practice will continue unless they determine to send up no case unless drawn by counsel (a).

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WILLIAMS, J.—I am of the same opinion. There are circumstances sufficient to sustain the finding of the sessions. We are pressed with a supposed difference of opinion in a former case (b). There was no difference of opinion in *principle*. The difference of opinion arose from the different view which was taken of the practice of the sessions. There is no ground, in my opinion, for saying that this is not a contract for *teaching and learning*. The terms of the contract are, not to take the pauper into the master's *service*, but to take him into his *employment*;—an equivocal phrase, which may apply to a service as an apprentice or as a servant. Although the language of the contract is not express that the master was to teach and the pauper to learn, yet the pauper is to go on trial, and was also to draw, which was to pre-

(a) *Vide ante*, 366, 367 (a).

(b) *Rex v. Woolpit*, *ante*, 353.

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pare himself for the business. The term, that the pauper is to go on trial, is equivocal; but the stipulation that he is to draw, refers to a business which is to be taught on the one hand and learnt on the other. I should have been sorry if the facts had been contradictory to the conclusion which has been drawn by the sessions; because they appear to have acted on *Rex v. Crediton*, in which this Court had the fortitude, if I may so express myself, to overrule *Rex v. Little Bolton* (a), and many other preceding cases, which had produced infinite mischief at the sessions. Whether the parties *intended* a contract of hiring and service or of apprenticeship, is a plain and intelligible test for determining the nature of the contract, and I hope to see the sessions act upon it. Unless the sessions are clearly wrong in the conclusion which they draw from the facts, we ought not to disturb it.

COLERIDGE, J.—I should have been satisfied with merely stating my concurrence in opinion with the rest of the Court, had not so much of the argument turned on the *jurisdiction* of this Court, and the difference of opinion which was supposed to exist on the bench. There is no difference of opinion in principle. It is the jurisdiction of the sessions to determine matters of fact. This Court will reverse the finding of the sessions either when they come to a conclusion without *any* evidence, or when the evidence is *contradictory* to the finding.

Have, then, the sessions come to a conclusion? They have. They have found that this is an imperfect contract of apprenticeship. Is that finding *necessarily* wrong? In my opinion the sessions have come to a right conclusion. What is an imperfect contract of apprenticeship? An imperfect contract is that which has

(a) Cald. 367.

the same object as a perfect contract, but by which the object has not been fully effected. The object of parties to an apprenticeship is, that the master should teach and that the apprentice should learn; and it seems to me that this was the object of the parties in this case. The parties say, we will try for two years if the master can teach and the boy can learn the trade; if they can, then we will perfect the contract. That is an imperfect contract of apprenticeship. It has been said that no contract has been held a contract of apprenticeship, unless the parties expressly undertook to *teach* and *learn*. I do not see the precise words in this case, and I cannot accede to the proposition that those precise words are necessary. It is sufficient if, from all the circumstances of the contract, it can be inferred that that was the object of the parties.

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Order of Sessions confirmed.

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UPON appeal, an order, whereby *Rebecca Thompson* was removed from West Bromwich, Staffordshire, to the township of Oldbury, Salop, was confirmed, subject to the following case:


The parish of Hales-Owen consists of the borough of Hales-Owen, the township of Oldbury, and ten other

townships, C. and D. (jointly maintaining their own poor,) in the county of S., and one township, E. (separately maintaining its own poor,) in the county of W.

This order is conclusive upon that part of B. which lies in the county of S., *semble*.

After the removal, C. and D., being required by mandamus, elect separate overseers and maintain their poor separately; the same pauper is afterwards removed from A. to the township of C. C. is not estopped by the former removal.

By an order, unappealed against, a pauper is removed from A. to the parish of B., in the county of S. B. at that time consists of two

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divisions situate in Shropshire, and three townships (Lutley, Cradley, and Worley,) situate in Worcestershire.

The three Worcestershire townships have always supported their poor apart from each other, and from the rest of the parish.

The township of Oldbury, the borough of Hales-Owen, and the ten divisions above mentioned, which lie in Shropshire, and which form the remaining part of the parish, until the separation of the township of Oldbury from them, as hereafter mentioned, always supported their poor *jointly*, and the affairs of the Shropshire part of the parish had, until that event took place, been administered by the churchwardens and four overseers, appointed respectively for four quarters, (Oldbury being one,) into which that part of the parish was divided.

In 1832, this Court made absolute a rule for a mandamus to compel the appointment of overseers for the township of Oldbury, pursuant to the 13 & 14 Car. 2, c. 12, s. 21; since when that township has maintained its own poor distinct and apart from the other parts of the parish.

In 1816, the pauper, together with her father and the rest of his family, was removed by an order of justices from Harborne, Staffordshire, to the parish of Hales-Owen, in the county of Salop. Against this order no appeal was made, and no subsequent settlement has been gained by the pauper.

The pauper having become chargeable in West Bromwich, (where she resided,) was removed to the *township of Oldbury*, by an order of 6th January, 1834.

Against this order an appeal was entered, and came on for trial at the last Easter sessions for Staffordshire; when the respondents put in the order of removal made in 1816, and unappealed against. The appellants then proposed to prove that the pauper had never gained any

settlement in Oldbury, but the respondents contended that the last-mentioned order being unappealed against, was conclusive upon the parish of Hales-Owen, and every part thereof, and that as Oldbury at that time formed part of the parish of Hales-Owen, it was now *stopped* from contesting the question of the pauper's settlement not being in that township. And the Court of Quarter Sessions being of this opinion, declined to hear the evidence of the appellants, and confirmed the order.

The question for the opinion of this Court is, whether, under the circumstances above stated, Oldbury was precluded from contesting the question of the pauper's settlement, in an appeal against the present order.

*Uvedale Corbett*, in support of the order of sessions. It is clearly settled that an order of removal, unappealed against, is conclusive against that parish to which the pauper is removed by it. And *Rex v. Kirkby Stephen* (a), and *Spitalfields v. Bromley* (b), shew that the division of a parish into townships, is entirely a matter of convenience to the different parts of the parish, and is a matter with which the public have no concern. If a parish consists of two or more distinct vills, and it appears that the parish cannot otherwise conveniently enjoy the benefit of 43 Eliz. c. 2, this Court will grant a mandamus to appoint separate overseers to the distinct vills or townships; but how can such a division get rid of a liability previously contracted? In the present case, the order of 1816 could only be addressed to the parish at large, and being unappealed against, was conclusive that the pauper was settled in the parish gene-

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(a) Burr. Sett. Cases, 664.

(b) 18 Viner's Abridg. 463.

The parish may unite again, and then the order will assuredly be binding and conclusive on every part of the parish. [Lord *Denmun*, C. J. If the present order of removal had been directed to the parish of Hales-Cum-Nearby, possibly under it the pauper might have been removed to the particular part of the parish to which he belonged. Here, the order of removal is directed to the township of Oldbury. If you choose to act on the division of the parish, by removing to the newly-severed township, are you not bound to shew that the pauper's settlement is in that particular division of the parish? According to your argument, all paupers belonging to the whole parish might be removed to one division. Would the inhabitants of that division be estopped from giving evidence that the pauper was not settled in that division?] In *Rex v. Oakmere(a)*, a district previously extra-parochial was by act of parliament made a township, and it was provided that from thenceforth it should maintain its own poor, and have the like powers, privileges, and immunities, and be subject to the same regulations as other townships in the county; and it

sage in the judgment of Lord *Tenterden*, C. J. is—"This is not like the case of a modern appointment of overseers to places that formerly had no such officers, because all such places must have been vills from time immemorial, and consequently under a legal obligation to maintain their poor, and possessing a legal right to the appointment of officers, and by such appointment to remove persons under the same circumstances as other townships or parishes might do." [Lord *Denman*, C. J. That is assuming a question about which there is great doubt, whether an immemorial vill is under a legal obligation to maintain its own poor.] If the townships take the convenience of the division, they must likewise take the inconvenience. As between the several townships into which the parish is divided, the order is not conclusive; and any one of the townships would, as between itself and another of the townships, be at liberty to shew that the settlement was in any other of the townships. But as between the particular township and West Bromwich parish, the appellants were estopped from going into evidence, to shew that the pauper was not settled in their township. If the present order of removal, instead of being directed to the township of Oldbury, had been directed to the parish of Hales-Owen, there would have been good ground of appeal against the form of the order, since the parish of Hales-Owen does not now maintain its own poor. [*Cole-ridge*, J. The whole amount of the inconvenience which you contend you suffer, is the being deprived of the benefit of an estoppel. You seek to have the benefit of an act which never has been adjudicated on,—of a removal, the propriety of which has never been discussed.] Upon the former order of removal, it was adjudicated by the removing justices, that the settlement was in the parish of Hales-Owen, and it is only sought to

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make the order of removal conclusive of that fact, against the inhabitants of the parish.

*Whateley*, contra. The general rule is not disputed,—that an order unappealed against is conclusive; but there is no instance in which it has been held, that an order of removal is conclusive against a township not named in it. The order of removal made in 1816 was invalid, and never did operate as an estoppel. There are two distinct divisions in the parish of Hales-Owen—the one in the county of Salop, the other in the county of Worcester. The several townships in that part of the parish which is in the county of Worcester have always maintained their own poor apart from each other, and apart from that division of the parish which is in the county of Salop. The latter part of the parish maintained their poor jointly until 1832. No valid order of removal could therefore, at any time, be made to the parish of Hales-Owen, since there was no such parish maintaining its own poor. Suppose the order of removal, made in 1816, had been delivered to the overseers of one of the townships lying in the county of Worcester, that division of the parish which is in the county of Salop would not have been bound to take any notice of it, and, in fact, might not have been aware of its existence. If this order of removal is conclusive on the township of Oldbury, it would be equally conclusive against any other township in the parish. Consequently it would be left to the mere caprice of the removing parish, to remove a pauper to any particular township, and the order of removal would be evidence for or against a particular township, according to whether the service was upon one set of overseers or another. According to the main argument on the other side, the order of sessions would be conclusive even if the removal

had been from one of the townships of the parish to another. [*Coleridge, J.* Suppose the question had been between two third parishes, what would you have said was the effect of the first order unappealed against?] The appellants might have shewn that there was no such parish, for the purposes of settlement, as Hales-Owen.

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**LORD DENMAN, C. J.**—Can you contend, Mr. *Corbett*, that an order of removal, addressed to the parish of Hales-Owen, could be supported?


*Corbett. Spitalfields v. Bromley, and Rex v. Kirkby Stephen*, are authorities to shew that the order was valid. [*Lord Denman, C. J.* In *Rex v. Kirkby Stephen*, there was merely a misdescription,—a wrong description of a real place.] The order being upon the parish of Hales-Owen, in the county of Salop, might have been appealed against by the overseers of that part of the parish which is in Shropshire, and which had overseers distinct from the townships in Worcestershire.

*Whateley.* The first order of removal might have been served on the overseers of one of the townships in the county of Worcester, and in that case that part of the parish which is in Shropshire would not have been bound by the order; *Rex v. Bishop Wearmouth* (a); the case of the parish of *St. Botolph without Aldgate* (b).

**LORD DENMAN, C. J.**—I remember that when I first read the case, I thought that the respondents were right in contending that the order of removal was conclusive.

(a) *Ante*, ii, 83.

(b) *Raym.* 476.

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But upon more consideration, I think that the township of Oldbury is not estopped. In 1816, a removal was made to the whole parish of Hales-Owen, which then consisted of fifteen divisions; three in Worcestershire, and twelve in Shropshire. There is a good deal of difficulty introduced into the case, in consequence of the mode in which the parish of Hales-Owen is described in the first order of removal. The words "in the county of Salop," may be considered as introduced in order to identify the parish. Upon this I entertain much doubt. Supposing, however, the order to have been properly made to the whole parish, it appears to me that the township of Oldbury, which began to maintain its own poor some time after the order had been made, was at liberty to deny that it was estopped from giving evidence to shew that the settlement was not gained in that part of the parish of Hales-Owen which constitutes the township of Oldbury. Were it otherwise, a removing parish would be at liberty to select any township in the parish. There is no estoppel, unless the parties are the same. The party in the order of 1816 was the parish. The party now is the township. As the parties removing the pauper thought fit to say that the pauper was settled in the township of Oldbury, they ought to have proved that fact. *Rex v. Oakmere* is inapplicable, since it relates to a district newly made parochial—not to an immemorial vill. Lord Tenterden says (a), "This case arises on the act 52 Geo. 3, for inclosing the forest of Delamere, and the question is, whether the district newly created into a township under this statute, which before was neither in any parish nor township, is to be considered as if it had formerly been a parish or township with regard to settlement, or only as becoming so from the time of its

(a) 5 Barn. & Ald. 778.

creation under the act, and as if it had been formerly uninhabited. And we are of opinion, that the latter is the true construction and effect of the statute." It would rather seem, therefore, that if that, instead of being a new district, had been an ancient division which could have maintained its own poor, when it began to have separate overseers, it would have become a separate township as from the earliest time, and would have constituted such a division as a removal might have been made to. Under these circumstances, it appears to me that we must take it that the township is not concluded by any order made on the parish of Hales-Owen.

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PATTESON, J.—I entertain very considerable doubts upon this question. I thought, when the case was mentioned last term, that the township was estopped altogether, and precluded from denying that the pauper was settled in their township. My doubts are not cleared up now; but my lord and my brothers think that the township was not estopped, and I do not feel the doubts so strong as to lead me to say that I entirely differ from the rest of the Court. The parish seems to have been divided long before the first order of removal was made, and it ought to be taken that the order was made on that part of the parish which lies in Shropshire; and the order being so made, the pauper was continuously settled in that division of the parish, and in the Oldbury part of the division, as well as in the other parts. If it had been proved that the settlement had been gained by renting a tenement, not in Oldbury, that would not shew that the pauper was not settled in Oldbury as to a third parish. Since the making of that order Oldbury has been separated from the rest of the division of the parish, but I cannot fully understand


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how, by a district's dividing itself into partitions, any particular portion can get rid of a liability that previously attached to the whole. At the same time there are great inconveniences in deciding the other way, because it would follow that every part would be estopped, as well as Oldbury. I confess I am not fully satisfied, but my doubts are not so strong as to make me differ entirely.

WILLIAMS, J.—There is certainly the difficulty pointed out by my brother *Patteson*, that the parish, by their own act, are to get rid of a liability previously fixed upon them by the order of removal. Then, on the other hand, there is this difficulty, that if the pauper is conclusively settled in the whole and every part of the parish, and the parish were subsequently divided into twenty parts, a third parish might choose any one of the parts in which to fix the settlement of the pauper. It therefore comes to this, whether the precise ground on which the sessions have acted can be sustained. They have acted on the ground that this was an estoppel, and on that ground the evidence was refused. I think the township of Oldbury was not estopped. Admitting that the township is as distinct from the parish as Cumberland from Cornwall, I cannot conceive how a decision that the party was settled in the whole parish is any decision that he is settled in the particular district.

COLERIDGE, J.—I am of the same opinion. I do not think this is a question of estoppel. The ground on which an order of removal unappealed from or confirmed, is conclusive, is not that it is an estoppel, but that it is an adjudication by a Court of competent jurisdiction. The ground of my decision is this: The respondents have removed to Oldbury, and are therefore

bound to prove a settlement *in that township*. They put in the order of removal to Hales-Owen. That alone will not do for them. They must, therefore, make out their case by shewing, by parol evidence, that at the time when the order was made Hales-Owen and Oldbury were identical. The sessions prematurely stopped the inquiry. At the same time, I am aware the Court may have great difficulty in dealing with the case when it comes before them again. On the present statement I think the sessions have done wrong.

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Order quashed; the case to be re-heard.

DOE *d.* HIGGS and others, Churchwardens and Overseers  
 of St. Mary, Reading, *v.* TERRY and others.

**EJECTMENT** on a demise of certain messuages in St. Mary, Reading, on 1st May, 1834. At the trial, before *Alderson*, B., at the Berks summer assizes, 1834, a verdict was found for the plaintiff, subject to the following case:—

The lessors of the plaintiff were the churchwardens and overseers at the time of the demise and the bringing of the action. A rent of 1*l.* 10*s.* per annum had been paid by the predecessors to the defendants in the tenancy to the different successive churchwardens of the said parish, for many years prior to the passing of 59 *Geo.* 3, c. 12; and since that act came into operation, the rent had continued to be paid in like manner by the predecessors of the defendants, and by the defendants down to the time of the expiration of 1834. A notice to quit

lands of the parish church, is *primâ facie* evidence that the premises were parish property.

By 39 *Geo.* 3, c. 12, s. 17, all parish property is vested in the churchwardens and overseers for the time being.

Evidence of payment of rent to the churchwardens in respect of premises in the parish, and that leases have been made by the churchwardens, in one of which the property is described as parcel of the

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the premises in question, dated 20th March, 1833, by the then churchwardens and overseers of the parish, was, on 23rd March, 1833, duly served on the defendants. This notice required the defendants to deliver up the premises which they then held of the churchwardens and overseers of the poor of the parish of St. Mary, Reading, to the churchwardens and overseers of the poor of that parish, on Michaelmas-day then next, or at the expiration of the current year of their tenancy.

The defendants gave the following evidence :—

23rd April, 1753. By lease between *Thos. Knapp* and *John Knott*, wardens of the said parish of &c. of the one part, and *William Earles* of the other part; by which *Knapp* and *Knott*, in consideration of the surrender of a former lease, and also of a fine of 20*l.*, demised the premises in question to *Earles* for fifty-one years, from Lady-day 1753, at the yearly rent of 30*s.*

Deduction of title to the lease, from *Earles* to *Mary Searle*.

29th April, 1802. By lease, between *John Moore* and *Nathaniel Clissold*, churchwardens of the parish church of St. Mary, in Reading aforesaid, of the one part, and *Mary Searle* of the other part, the premises in question, therein described to be parcel of the lands and tenements belonging to the parish church of St. Mary in Reading, were, in consideration of the surrender of the lease of 1753, and of a fine of 70*l.*, demised to *Mary Searle*, her executors, &c. from the feast of the Annunciation then last, for fifty-one years, paying yearly unto the said churchwardens and their successors the rent of 30*s.*

It was admitted on the part of the plaintiff, that the defendants were the legal representatives of *Mary Searle*.

It was contended on the part of the plaintiff, that the last-mentioned lease was void,—that the estate and interest in the premises had vested in the churchwardens

and overseers, by the operation of 59 *Geo. 3*, c. 12,—and that the defendants' only interest therein had been a tenancy from year to year, which the notice to quit had determined.

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*Talfourd*, Serjeant, for the plaintiff. The churchwardens had no authority to grant leases of the property in question. Consequently the leases were void: *Phillips v. Pearce* (a). The only question is, therefore, whether the property was vested in the lessors of the plaintiff as churchwardens and overseers for the time being, by 59 *Geo. 3*, c. 12. This point was expressly decided in *Doe d. Jackson v. Hiley* (b); in which Lord *Tenterden*, C. J., in delivering the judgment of the Court, thus expresses himself:—"Upon the second point, whether the statute 59 *Geo. 3*, c. 12, s. 17, extends to tenements, the profits of which are applicable to the purpose for which a church-rate is levied, or is confined to those which are applicable merely to the relief of the poor, it is undoubtedly true that the *primary* object of the statute (as appears from the title, preamble, and the early sections,) was the better and more effective execution and amendment of the laws for the relief of the poor. The 17th section goes *much further*. It enacts, "that all buildings, lands, and hereditaments which shall be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority and for any of the purposes of that act, shall be conveyed, demised, and assured to the churchwardens and overseers of the poor of every such parish respectively, and their successors, in trust for the parish; and such churchwardens and overseers of the poor, and their successors, shall and may, and they are hereby empowered to accept,

(a) 8 Dowl. & Ryl. 43; 5 Barn. & Cressw. 433.

(b) 10 Barn. & Cressw. 885.

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take, and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands, and hereditaments, and also all other buildings, lands, and hereditaments, belonging to such parish." The latter words are most general, and comprehend all buildings, lands, and hereditaments, belonging to the parish; and although the poor may be the primary object of the statute, we think the safest course for us to adopt, in construing this section of the act, will be to give full effect to that *generality* of expression, there being nothing to shew that lands or buildings which are applied in aid of the church-rate, do not require the aid of this provision as well as those which are applied to the relief of the poor. The property being vested in the lessors of the plaintiff, and the lease being void, the only relation in which the defendants could stand with respect to the lessors of the plaintiff was, that of tenants from year to year.

It has been suggested, that the subsequent receipt of rent by the successive churchwardens operated as a *confirmation* of the lease; but no receipt of rent will set up a lease which is *void*. Thus, in *Doe d. Simpson v. Butcher* (a), it was held that a lease void against a remainderman cannot be set up by his acceptance of rent, and suffering the tenant to make improvements after his interest has vested in possession. *Jenkins d. Yate v. Church* (b), is to the same effect.

*Ludlow*, Serjt. (with whom was *Talbot*), for the defendants. The lessors of the plaintiff did not, by the evidence given, entitle themselves to the possession of this property, upon which the lessees, the defendants, have expended a very considerable sum of money, and it would be extremely unjust to deprive them of this pro-

(a) 1 Dougl. 50.

(b) Cowp. 482.

erty. In 1753 a lease is made by two individuals, who are described as *wardens* of the parish of St. Mary, in London. It is to be presumed, at this distance of time, that the grantors in that lease, either in their own right or as trustees, had power to make that lease; for in 1801, in consideration of the *surrender* of the lease of 1753, another term is granted, which is vested in the defendants. A valid surrender requires a sufficient estate in the *surrenderer* to accept a surrender. It is therefore to be presumed, from the fact of a surrender having taken place, that the term was granted by the lease in 1753, and that consequently the grantors had an estate in fee, out of which the term was carved. In 1801 a new term is granted, and the statute transferred to the succeeding churchwardens, the reversion subject to the term. The reversion may each year have been conveyed by the preceding churchwardens and overseers to the succeeding officers; and at this distance of time this should be presumed to have been done, rather than that it should be held that the lease was invalid. *Philips v. Pearce* is distinguishable. There, the lease was granted *after* the passing of the act. In the present case, the first lease is long *anterior* to the statute. Assuming, however, that the grantors in the lease of 1802 had no interest in the property, then that lease is good by way of *estoppel*; and by the receipt of rent under it, the lessors of the plaintiff are precluded from disputing its validity. But it is said that the statute of 59 Geo. 3 vested this property in the churchwardens and overseers. The effect of the statute was to vest the reversion expectant on the determination of the lease in the churchwardens and overseers for the time being, and nothing more. It is questionable whether, under the circumstances of this case, the statute transferred any property in these premises to the lessors of the plaintiff. The

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land is described as belonging to the *parish church* of Reading. *Doe d. Jackson v. Hiley* decides that where the profits of the land are applicable to those purposes for which church-rates are levied, it is vested by the statute in the churchwardens and overseers; but there is a great difference between land *belonging to the parish church*, and land, the profits of which may be applied to the same purposes as *church-rates*. *Doe d. Jackson v. Hiley* is therefore distinguishable from the present case.

*Talfourd*, Serjt., in reply. The two cases cited fully make out that the property passed to the lessors of the plaintiff. [*Patteson*, J. I do not see how it appears that this property belonged to the parish.] The payment of rent to the churchwardens, after the passing of the statute, is an admission that this is *parish property*. The churchwardens are bound to apply the rents to the use of the parish; and the Court will presume that the churchwardens have acted rightly, and that the rents were so applied.

PATTESON, J.—The difficulty that I have had, has been to see how it appears that this is parish property. That is not very satisfactorily made out. I should have expected that something of the history of the former ownership of the property would have been detailed. In *Doe v. Hiley* all the facts relative to the property appeared. It was held under the trusts of a will; and a lease for forty years had been granted, subject to the same trusts. Then came the statute. There were several demises, of which one was by the heir at law of the surviving trustee; and Lord *Tenterden* said, that the verdict ought to be entered on that count in the declaration in which the demise was laid to have been by the churchwardens and overseers of the poor of the parish.

That is a strong case to shew that parish property, by the operation of the statute, is transferred to the churchwardens and overseers. Here, it does not appear in *whom* the legal estate was vested. If it was parish property, the fee-simple became vested in the parish officers by the operation of the statute. They received rent from the defendants, who must be taken to know the law, and that by doing so they became their tenants.

The only remaining question is, whether the defendants became tenants to the parish officers *from year to year*, or held *under the lease*. The parties to the lease in 1753 are described as the *wardens* of the parish, and it must be taken to be a demise by the *churchwardens*. The lease in 1802 is also made by the churchwardens and overseers. It passed therefore no legal interest. Nor do I see how it could operate by way of *estoppel* against the present lessors of the plaintiff, since they do not claim through the persons who were grantors in that lease. The act could not operate to convey the reversion from the grantors in that lease to the lessors of the plaintiff, since the former had no reversion (a). The defendants, therefore, were tenants; and there being no privity between the grantors and the lessors of the plaintiff, and the defendants having had due notice to quit, the plaintiff is entitled to a verdict.

WILLIAMS, J.—There is no pretence for saying that the churchwardens for the time being had, as such, any authority to grant the lease in 1753, or that in 1802. In each lease the property is described as belonging to the *parish church*. It seems to me therefore that this must be considered as belonging to the *parish*; and consequently, by the 59 Geo. 3, it was vested in the church-

(a) *Vide* 5 Nev. & Mann. 518, (a).

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wardens and overseers for the time being. It is clear that the lessors of the plaintiff are not estopped by the lease of 1802, because they are strangers to that lease. The defendants therefore were tenants to the lessors of the plaintiff, and they are entitled to recover in the name of their nominal lessee.

COLERIDGE, J.—I do not think that on this or on any other occasion we are to enter into the consideration of any hardship to result from the decision of the particular case. Here, the only question is, whether a *prima facie* case was made for the plaintiff. If it was, no doubt the plaintiff was entitled to a verdict. That *prima facie* case was made out, if this was parish property, and not otherwise. Is this shewn to be parish property? Evidence was given of the payment of rent to the churchwardens and overseers. In one of the leases this is described as “parcel of the lands and tenements of the parish church.” These words must be taken in a *popular* sense. Then, the rent is reserved to the churchwardens and overseers *for the time being*.

The evidence produced on the part of the defendants rather helps out what was before a weak case; and it appears to me that upon the whole of the evidence this is shewn to be *parish property*. The case is consequently resolved into the ordinary case of landlord and tenant.

Judgment for the plaintiff.



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## ROBERTS v. WILLIAMS and another (a).

**THIS** was an action against two justices of the county of Denbigh, for imprisoning the defendant in the House of Correction without reasonable or probable cause. At the trial before *Bolland, B.*, at the Chester spring assizes, the notice of action to the defendants, required by the 24 Geo. 2, c. 44, s. 1, being put in, it appeared to be signed as follows:—"Edward Jones, Record Street, Ruthin, Denbighshire, attorney for the said Robert Roberts." It was proved that Mr. Jones resided at a place called Brynhyfrid, about a quarter of a mile out of the town, but within the borough of Ruthin; but that his office of business was in Record Street, in that town, and was known by the defendants. The defendant's counsel contended that this was not a sufficient notice within the statute, which required the name and place of abode of the attorney to be subjoined. The learned judge reserved the point, and the plaintiff had a verdict for 15*l.* *John Jervis* having accordingly obtained a rule nisi to enter a nonsuit (b)—


A notice of action to justices, under the 24 Geo. 2, c. 44, s. 1, is sufficient, which is indorsed with the name and place of business of the attorney, although he actually resides elsewhere.

*R. V. Richards* and *Dunn*, in Trinity term, shewed cause.—The notice was sufficient. The only object of the statute was to enable the justices to find out the attorney, in order to tender amends. That object is best attained by holding the words "place of abode," to be satisfied by the place of business of the attorney, where

(a) This case is taken, by permission, from Messrs. *Crompton, Mason* and *Roscoe's Reports of Cases in the Exchequer.*

(b) He objected also that *E. Jones* was not the attorney on

the record; but the Court said the plaintiff might have changed his attorney after the notice was served, and before the declaration was delivered.

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he is most readily to be found. Suppose an attorney lived at Hampstead, having an office in London; the notice be dated from Hampstead rather than from London? Or suppose five or six in a firm, resident in different places; are all their sleeping places to be given in the notice? [*Parke, B.* That would be in case of a sole defendant, since it would give him the means of finding out the place of any of them.] The object of the writ is generally rather to avoid a tender; that purpose is much aided by a notice framed as is contended for by the other side. In *Osborn v. Gough* (a), a notice, "W. S., of Birmingham," was held sufficient; if, therefore, this notice had been merely "of Ruthin," it would clearly have been sufficient; then the words "of Street" may be rejected as surplusage. In *Ja. Swift* (b), it was held that the notice might be given without the name of the firm. [*Parke, B.* The question was, whether it did not satisfy the word *name*, the name not being *christian and surname*.] Similarly, the place of abode of an attorney means his place of business; his act has reference to him only in his character of attorney; his place of abode, therefore, is where he resides during the day for the purpose of doing business as an attorney. The notice need not be such as to preclude the necessity of all inquiry. *Taylor v. Fenwick* (c) is different; there the description, "at Durham," was manifestly insufficient, since the party might be merely passing through the town on a journey. The Uniformity of Process Act has the same words; must all writs, therefore, henceforth be indorsed with the place where the attorney resides. In that act, too, a distinction is expressly taken between the place of abode of the attorney, and the *reside*

(a) 3 Bos. & P. 551.

R. 625.

(b) 4 B. & C. 681; 6 D. &

(c) 3 Bos. & P. 353, n.

erty, which distinction has been acted upon in several (a).

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*terois*, contra. The words of the statute being and unequivocal, the best course is to follow them at deviation. In *Taylor v. Fenwick*, Lord Mans-ays, "In favour of justices, the legislature has at fit to prescribe a precise form; whether right or does not matter; in words he must tell you his of abode." Observations to the same effect fell the Court in *Osborn v. Gough*. *Hill v. Hum-* (b) is strongly in point for the defendants. That decision on the 2 Geo. 2, c. 23, s. 23, requiring the ry of an attorney's bill at the defendant's place of ; and Lord *Kenyon* ruled, that leaving it at his ing-house was not enough; although, the defend- ing a merchant, it might be urged that he was likely to pay the bill there than at his dwelling- .

*Cur. adv. vult.*

the judgment of the Court was now delivered by ABINGER, C. B.—The Court have taken some to consider the objection taken in this case, which e of considerable importance in practice. We find press decision upon the point; and we were struck the reason of the thing, and the great inconvenience would result in practice from holding the con- tion of the act to be as is contended for by the dants. Under the Uniformity of Process Act, e the same expression is used, it appears that the ice has uniformly been to state the place of busi-

See *Engleheart v Eyre*, 2 3 D. P. C. 429; *Yardley v. Jones*,  
P. C. 145; *King v. Monk-* 4 D. P. C. 45.  
*ib.* 221; *Pickman v. Collis*, (b) 2 Bos. & P. 343.

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ness, and that that practice is supported by several decisions. We think, therefore, that reason and convenience compel us to hold, that the place where an attorney abides for the purposes of his business, is a correct description to satisfy this act of parliament, and that this notice was therefore sufficient. We are disposed to think, however, that either place will do; that the act will be sufficiently complied with, whether the attorney state the place of his actual residence, or his place of business. One case was suggested at the bar, of several persons in partnership, carrying on their business at some one specified place, but all residing in different places; very great inconvenience would ensue, if it were necessary that the notice must specify all those places of residence, and the defendant were thus obliged to go to several different places to tender amends. After some doubt, therefore, we have come to the conclusion, that the place of business is a sufficient place of the attorney's abode, within the meaning of the act. The rule for entering a nonsuit will therefore be discharged.

Rule discharged.

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*CENTRAL CRIMINAL COURT.*

REX v. HASTINGS and GRAVES (a).

A jury may, if they please, act upon the evidence of an accomplice, without any confirmation of his statement.

THE prisoners were indicted for stealing a quantity of lead and copper, the property of the commissioners of Greenwich Hospital.

(a) This and the following cases are taken, by permission, from Messrs. Carrington and

*Payne's Reports of Cases at Nisi Prius, &c.*

*Clarkson*, in stating the case for the prosecution, observed, that he should be under the necessity of calling an accomplice of the prisoners as a witness against them; and admitted that he should not, according to the depositions, be able to confirm his testimony as to the particular prisoners charged; yet he could confirm him as to the general circumstances of the case, and as to the mode in which the robbery had been committed.

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Lord DENMAN, C. J., said—I consider, and I believe my learned brothers agree with me, that it is altogether for the jury, and they may, if they please, act upon the evidence of the accomplice without any confirmation of his statement. But one would not, of course, be inclined to give any great degree of credit to a person so situated.

The accomplice was examined and several other witnesses; but the other witnesses rather contradicted than confirmed him in any thing, and the prisoners were both

Acquitted.



REX v. DANIEL O'DONNELL.

THE prisoner was indicted for stealing fifty-four silver spoons, and various other articles, the goods of *M. A. Moore*, his mistress, in her dwelling-house.

The prisoner was not defended by counsel, and he complained that he was prevented from employing any by the act of the officer who searched him, in taking away all the money that he had about him.

A constable who apprehends a prisoner, has no right to take away from him any money which he has about him, unless it is in some way connected with the offence

with which he is charged, as he thereby deprives him of the means of making his defence.

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PATTESON, J., in the course of his summing up, said—The prisoner complains that his money was taken from him, and that he was thereby deprived of the means of making his defence. Generally speaking it is not right that a man's money should be taken away from him, unless it is connected in some way with the property stolen. If it is connected with the robbery, it is quite proper that it should be taken. But unless it is, it is not a fair thing to take away his money, which he might use for his defence. I believe constables are too much in the habit of taking away every thing they find upon a prisoner, which is certainly not right. And this is a rule which ought to be observed by all policemen and other peace officers.

Verdict—Guilty.

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OXFORD ASSIZES.

REX v. NEAL and TAYLOR.

In a case of felony the testimony of the wife of an accomplice is not such evidence as a jury ought to rely upon as confirmation of the statement of the accomplice.

THE prisoners were indicted for stealing a sheet, the property of *Alban Bull*.

It appeared that the stolen sheet was found in the house of *William Brain*, who was admitted king's evidence; and *William Brain* gave evidence to shew that the prisoners stole the sheet.

PARK, J.—What evidence have you, Mr. *Walesby*, to confirm the accomplice's statement?

*Walesby*, for the prosecution.—The wife of the accomplice.

PARK, J.—Have you any other confirmation?

*Walesby*.—No, my Lord.

PARK, J.—Confirmation by the wife is, in a case like this, really no confirmation at all. The wife and the accomplice must be taken as one for this purpose. The prisoners must be acquitted. ✓

Verdict—Not guilty.

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WORCESTER ASSIZES.

REX v. SARAH SIMMONDS.

THE prisoner was charged with receiving seven gold rings, knowing them to be stolen.

*Watson*, for the prisoner, moved for an order for Mr. *Fryzer*, the prisoner's attorney, to see a person who was committed to the prison of the city of Worcester for further examination, on a charge of felony, she being a material witness for the prisoner *Sarah Simmonds*. He moved this on an affidavit, which stated these facts, and that Mr. *Fryzer* had applied to the governor of the city prison, and also to one of the magistrates of the city.

PARK, J.—The governor of the city prison ought to allow the prisoner's attorney to see the witness in his presence.

*A.* was to be tried for felony at the assizes for the county of W., and *B.*, a material witness for *A.*, was committed to the W. city prison for further examination, on a charge of felony:—Held, that before the trial of *A.*, the governor of the W. city prison ought to allow *A.*'s attorney to see *B.* in his presence.

Mr. *Griffiths*, the governor of the city prison, stated, that he had offered that, but that the prisoner's attorney

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wished to see the witness apart, which he would not allow.

PARK, J.—You acted most correctly.

Motion refused.

The KING v. RIVERS.

If a prisoner's examination before a magistrate conclude "taken and sworn before me," and under that be the magistrate's signature, it is not receivable in evidence; and the judge will neither allow the magistrate's clerk to prove that in fact it was not sworn, nor will he receive parol evidence of what the prisoner said.

**NIGHT** poaching. The prisoners were charged on the stat. 9 Geo. 4, c. 69, s. 9, with poaching in the night-time, (being armed,) on the land of *John Taylor, Esq.*

It was proposed, on the part of the prosecution, to give in evidence a statement made by the prisoner before the Rev. *George Turberville*, the committing magistrate, which had been reduced into writing. At the conclusion of the statement were written the words "taken and sworn before me;" and under those words was the signature of *Mr. Turberville*, the magistrate.

PARK, J.—I cannot receive this; it appears to have been taken on oath.

*F. V. Lee*, for the prosecution, proposed to call *Mr Skey*, the magistrate's clerk, to prove that the prisoner had in fact not been sworn.

PARK, J.—I cannot allow *Mr. Skey* to contradict the writing of the magistrate.

*F. V. Lee* proposed to give parol evidence of what the prisoner said before the magistrate; and cited the

case of *Rex v. Reed* (a), which was a case of murder, in which the examination of the prisoner by the coroner was inadmissible on account of an irregularity, and Lord Chief Justice *Tindal* allowed the coroner to give parol evidence of what the prisoner said.

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PARK, J.—I cannot receive parol evidence. I remember a case in which a heading of a deposition was used, and it stated that the prisoner was sworn. The written evidence was rejected; and parol evidence was offered, and that was rejected also. As I see that there is a writing, I cannot receive parol evidence.

Verdict—Not guilty (b).

(a) 1 M. & M. 403. The report does not state what the irregularity in the written examination was. It has been suggested to us that it was, that

the examination was not signed by the prisoner. See the case of *Rex v. Pressly*, 6 C. & P. 183.

(b) See the case of *Rex v. Bentley*, 6 C. & P. 148.

### The KING v. CHARLES PRICE.

THE prisoner was indicted under the stat. 9 Geo. 4, c. 31, ss. 11 and 12, for attempting to discharge loaded arms at *Thomas Greaves*, with intent to murder him. The indictment also contained the usual counts, laying an intent to disable, to do grievous bodily harm, &c.

A person who is employed by a lord of a manor as a watcher of his game preserves, is a person having authority to apprehend

It appeared that the prosecutor, who was not a regular night poachers, and he need not have any written authority from the lord of the manor.

Where a person is found night poaching on the manor of A., by one of his watchers, and is pursued off the manor, and then on to it again, and there snaps his gun at the watcher, he is guilty of a capital offence, under the stat. 9 Geo. 4, c. 31, ss. 11 & 12.

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larly appointed gamekeeper, was employed as a watcher to watch for poachers in the game preserves of the Earl of *Coventry*; and that, on the night of the 22nd of November, 1854, the prosecutor and another watcher found the prisoner and two other persons in a wood of Lord *Coventry*, called Cattacraft, situate in a manor belonging to his lordship; that they pursued the prisoners out of that wood into a field not within his lordship's manor, and of which his lordship was neither owner nor occupier; and that, being hard pursued, the prisoner returned back into Lord *Coventry's* manor; and, being still pursued, he levelled his gun and snapped it at the prosecutor, so as to burst the copper cap of the gun and make a small flash. The prisoner was immediately secured, and his gun was ascertained to be loaded with powder and shot.

*Godson*, for the prisoner, submitted that the prisoner ought to be acquitted on two grounds: first, that there was no sufficient proof that the prosecutor was such a servant of Lord *Coventry* as was authorized to apprehend persons who were out night poaching; and, second, that if the prosecutor had such authority, his authority ceased from the moment that the prisoner was out of Lord *Coventry's* manor; and that the fact that he was driven upon the manor again by the prosecutor and his party could make no difference, and would not give the prosecutor an authority to apprehend, if he had it not in the field into which the prisoner had run. He cited the case of *Rex v. Addis(a)*.

*C. Phillips*, for the prosecution, cited the case of Capt. *Moir*, who was tried before Lord *Tenterden*, on

(a) 6 C. & P. 338.

the home circuit. In that case the person who was killed by Capt. *Moir* persisted in crossing his land where there was no path, and Capt. *Moir* went home to fetch his pistols, and, meeting the deceased, some angry words passed, and Capt. *Moir* shot the deceased, and killed him. Upon this evidence Lord *Tenterden* left it to the jury to say whether, at the time when Capt. *Moir* shot the deceased, he was in fear of the loss of his own life; and the jury, finding that he was not, Capt. *Moir* was convicted and executed.

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*F. V. Lee*, on the same side. The witnesses have stated that this wood is in Lord *Coventry's* manor, and that they were Lord *Coventry's* servants.

*Godson*. In the case of Capt. *Moir* it appeared that the prisoner went home to fetch his pistols, which is wholly different from the present case. I should submit that the prosecutor, when the prisoner got off the manor, ought to have stopped, whereas he followed the prisoner off Lord *Coventry's* manor. There is also no proof of any delegation of authority by Lord *Coventry* which authorized the prosecutor to apprehend the prisoner. The prosecutor had no public authority, and he is not a known officer. There is no writing produced; and, upon this evidence, it must be taken that the authority of the prosecutor was to watch the game, and not to apprehend poachers.

PARK, J.—The inclination of my opinion is, that this case is not governed by that of *Rex v. Moir*; and I think that the case of *Rex v. Addis* does not apply. If the firing had taken place off the manor, I should not decide whether, if death had ensued, it would have been murder or manslaughter; but, as it occurred on the manor, I

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think it is the same as if the parties had never been off the manor. With respect to the authority to apprehend being in writing, I do not find any case that requires that it should be so. I shall, therefore, decide at present that the prosecutor had sufficient authority to apprehend trespassers who were there in the night to destroy the game. I will, however, confer with my learned brother *Coleridge*, and reserve the case for the opinions of the judges, if necessary.

Verdict—Guilty.

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PARK, J. (having consulted *Coleridge*, J.,) on the following day said—In this case two objections were taken by Mr. *Godson*, which I then overruled, and I am confirmed in my opinion by that of my learned brother. It was first contended that it was not shewn that the prosecutor had sufficient authority to apprehend the prisoner; and, second, that as the prisoner had escaped out of the manor, and was pursued back again, the prosecutor had no right to apprehend. In support of the latter objection, the case of *Rex v. Addis* was cited. In that case it appeared that the prosecutor's servant, who was trying to apprehend the prisoner, had no authority whatever to apprehend, which was not so here; that is, therefore, unlike the present case. The case of *Rex v. Ball* (a) is much nearer in point. In that case there was no written authority to apprehend, and the shooting was on a turnpike road. Under these circumstances I think that I rightly overruled the objections.

(a) 1 M. C. C. 330.

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STAFFORD ASSIZES.

The KING v. TOMLINSON.

MENT on the stat. 9 Geo. 4, c. 31, ss. 11 or shooting at *Robert Evans*, with intent to maim, &c. There were the usual counts laying to disable, to do grievous bodily harm, &c. The prosecutor said, "I am in the service of Mr. [redacted]. On the morning of the 17th of December, [redacted] was going to my work at Breewood, when I was shot fired in a plantation belonging to my employer. I soon after saw the prisoner there; he dropped a pheasant. I went after him, and he turned round his gun at me, but did not put it to his head. I said 'No, no,' and turned the barrel aside. He went off, and I secured him." In his cross-examination he said, "I am not sure that it was before eight o'clock in the morning when this occurred."

The servant of the owner of a wood attempted to apprehend a poacher whom he found there at eight o'clock on the morning of the 17th of December, and the poacher shot at him:—Held, that this was not a capital offence within the stat. 9 Geo. 4, c. 31, ss. 11 & 12, as there was no proof that the poacher was in pursuit of game an hour before sunrise.

and *F. V. Lee*, for the prisoner, submitted, that if the prisoner had not been in pursuit of game an hour before sunrise, the prosecutor had no right to apprehend him; and that being so, the crime of the prisoner had ensued, would have been manslaughter.

JUDGE, J., held this objection fatal, and directed the jury to find the prisoner guilty.

Verdict—Not guilty.

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## The KING v. KENDRICK and seven others.

The 9th sect. of the stat. 9 Geo. 4, c. 69, which relates to night poaching, creates two distinct offences:

First, the entering in the night on land, to the number of three, some one of them being armed; and, second, the being in the night on land to the number of three, some one of them being armed.

The form of indictment for night poaching given in Jerv. Arch. is good.

**NIGHT** poaching. The indictment, which was on the stat. 9 Geo. 4, c. 69, s. 9, charged that the prisoners on &c., at &c., "by night did together unlawfully enter and were in certain land in the occupation of *John Shawe Manley*, there situate, for the purpose then and there by night as aforesaid of taking and destroying game, the said *Timothy Kendrick* [and the others, naming them,] *being then and there by night as aforesaid armed with guns and other offensive weapons*, against the form of the statute," &c. (a).

*C. Phillips* and *Godson*, for the prisoners, objected that the indictment did not contain any sufficient allegation that the prisoners were armed when they entered the land. They cited the form given in *Archbold's* edition of *Peel's Acts* (b), and the case of *Davis and others v. The King* (c).

(a) This indictment is exactly in the form given in Jerv. Arch. Cr. Pl. 497.

(b) 2 Peel's Acts, 209. The form of indictment there given is as follows:—"That *A. B.*, late of &c., together with divers other evil-disposed persons, to the number of three and more, to the jurors aforesaid unknown, on &c., at about the hour of eleven on the night of the same day, with force and arms, at the parish aforesaid, in the county aforesaid, *being then and there respectively armed with guns*, did then and there together, by night

*as aforesaid, and armed as aforesaid, unlawfully enter* certain inclosed land, then in the occupation of one *C. D.* there situate, and were then and there by night as aforesaid together unlawfully in the said land, for the purpose then and there of taking and destroying game, against the form of the statute," &c.

(c) In the case of *Davis v. The King* (in error), 5 M. & R. 78, 10 B. & C. 89, the indictment charged that the prisoners on &c., at &c., "being to the number of three and more persons together, did by night un-



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person's being found armed on the land, whether he carried the arms there or not. Again, supposing them to be charged with an unlawful entry, one of them being armed; though there might be some more difficulty there, that also would be proved without any further proof than that he was there with arms. But this is a mixed count, because it charges both the entry and the being: however, the prosecutors need not prove the whole; and that being so, this case comes to the offence of being on the land armed, which cannot admit of any argument. It is enough to say, that all the requisites of the statute have been complied with; and I therefore think that there is nothing in the objection.

Verdict—Guilty (*a*).

(*a*) The words of the statute, 9 *Geo.* 4, c. 69, s. 9, are, "That if any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, crossbow, firearms, bludgeon, or any other offensive weapon, each and every such persons shall be guilty of a misdemeanor, and being convicted thereof before the justices of gaol delivery, or of the court of great sessions of the county or

place in which the offence shall be committed, shall be liable, at the discretion of the court, to be transported beyond seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned and kept to hard labour for any term not exceeding three years; and in Scotland any person so offending shall be liable to be punished in like manner."

As to what shall be deemed night, see sect. 12; and as to what shall be deemed game, see sect. 13.



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KING v. SPILSBURY, FERRALL, and others.

DER. The prisoners were indicted for the wil-  
der of *Joseph Johnson*.

appeared that the prisoner *Ferrall* had made a  
nt to a constable in whose custody he was, but  
was drunk at the time; and it was imputed that  
stable had given him liquor to cause him to be so.

ow, Serjt., objected that what a prisoner said  
ach circumstances was not receivable in evidence.

BRIDGE, J.—I am of opinion that a statement  
made by a prisoner while he was drunk is not  
e inadmissible as evidence against him; and  
render a confession inadmissible, it must either  
ained by hope or fear. This is matter of obser-  
for me, upon the weight that ought to attach to  
ement when it is considered by the jury.

statement was received.

appeared that on the examination of the prisoner  
the magistrates, one of the witnesses stated that  
I bought a pot of the prisoner *Ferrall*, upon  
Mr. *Oldham*, one of the magistrates, asked what  
pot it was, and the prisoner *Ferrall*, although the  
a was not particularly addressed to him, made an

statement of the prisoner after the evidence against him was concluded.  
question, whether a declaration of a deceased person be admissible as a  
on in *articulo mortis*, the judge will consider whether the conduct of the  
was that of a dying person, such as whether he gave directions respecting  
d, his will, &c., and not merely the expressions he used, as to whether he  
e should or should not recover.

A statement  
made by a  
prisoner when  
he is drunk, is  
receivable in  
evidence; and,  
*semble*, that if  
a constable  
gave him li-  
quor to make  
him so, in the  
hope of his  
saying some-  
thing, that will  
not render the  
statement in-  
admissible,  
but it will be  
matter of ob-  
servation for  
the judge in  
his summing  
up.

If a prisoner,  
during the ex-  
amination of  
the witnesses  
against him  
before the ma-  
gistrate, make  
an observa-  
tion, parol  
evidence may  
be given of  
such observa-  
tion, if the  
magistrate's  
clerk prove  
that he only  
took down the  
evidence of  
the witnesses,

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*Talbot*, for the prosecution, proposed to ask what it was that the magistrate asked.

*Ludlow*, Serjt. I submit that no evidence can be given of what passed before the magistrate except the depositions.

COLERIDGE, J.—What the magistrate himself said would not be taken down. That may certainly be asked.

The question was put.

*Talbot* proposed to ask what answer the prisoner *Ferrall* gave.

*Ludlow*, Serjt. I submit that at all events the statement made before the magistrate, and signed by him, must be put in.

COLERIDGE, J.—There seems to be no necessity for putting in the written examination. It is not what the prisoner says when he is called on for his defence that is asked, but an observation made in the course of the case; and as that would not be put down as a part of his statement, I am clearly of opinion that it is receivable.

Mr. *Frith*, the clerk to the magistrates, was called. He stated that he took down the examination of the witnesses, and that on the prisoners being asked what they had to say for themselves, he took down what they said, but that he did not take down any thing which either of the prisoners said before the witnesses had been all examined.

COLERIDGE, J.—At the close of the evidence for the

examination, the prisoner is asked if he wishes to say anything, and if he does, it is taken down, and the evidence of that statement is the written deposition (a); if a prisoner says something while the witnesses are under examination, that does not stand on the same footing. I shall receive the evidence.

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The evidence was received.

It was proposed to give in evidence a declaration of the deceased *in articulo mortis*; and, to shew the state of the deceased at the time, the following evidence was given:—Mrs. *Martha Johnson* said, “I am the widow of the deceased. I went to fetch him home from Mr. *Rivers*’s after he was hurt. He took to his bed the day after, and on that evening I asked him how he was, and he said he was worse, and that he should die this time. He died seven days after that.”

*Henry Johnson* said, “I am the brother of the deceased; he at times thought he should recover, and at other times he thought he should not.”

*Michael Redfern* said, “I saw the deceased in his illness. On the day before he died, he said he thought he should not recover: he was delirious at that time on that day.” In answer to questions put by the judge, this witness said, “The deceased died on that day. On the Wednesday before his death, I asked the deceased if he thought he should recover; and he said he thought he should. He was then very ill, but sensible. I saw him on the Saturday following, which was the day before he died. He was not sensible at that time; he became sensible at twelve, and remained so for four days. I asked him if he thought he should recover,

(a) See *Rex v. Rivers*, ante, 400.

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and how he was: he said he thought he should not recover, as he was so very ill. He did not take leave of his wife, or give any orders about his funeral or his will, nor did he say any prayers."

Mrs. *Johnson* recalled. "I saw my husband on the Saturday. He died on the Sunday. He was at some times light-headed, and some times not. He several times had his children in to take leave of them before the Saturday. He thought from the Monday night that he should not recover."

Mr. *Hawthorn* said, "I am a surgeon. I first saw the deceased on the Wednesday morning. I last saw him on the Saturday, the day before he died; I think in the morning. He was delirious from Thursday, but was sensible on the Friday. I considered him in danger on the Thursday. I did not communicate my opinion to him, but I did to his friends and his wife."

Mrs. *Johnson*. "I did not inform my husband of what Mr. *Hawthorn* had informed me."

*Ludlow*, Serjt. It does not follow, that because the deceased thought that he should not ultimately recover, that the evidence is receivable.

COLERIDGE, J.—It is an extremely painful matter for me to decide upon; but when I consider that this species of proof is an anomaly, and contrary to all the rules of evidence, and that if received it would have the greatest weight with the jury, I think I ought not to receive the evidence, unless I feel fully convinced that the deceased was in such a state as to render the evidence clearly admissible. It appears from the evidence of the witness *Redfern*, that the deceased said that he thought he should not recover, as he was very ill. Now, people often make use of expressions of that kind, who have

no conviction that their death is near approaching. If the deceased in this case had felt that his end was drawing very near, and that he had no hope of recovering, I should expect him to be saying something of his affairs and of who was to have his property, or giving some directions as to his funeral, or as to where he would be buried, or that he would have used expressions to his widow importing that they were soon to be separated by death, or that he would have taken leave of his friends and relations in a way that shewed that he was convinced that his death was at hand. As nothing of this sort appears, I think that there is not sufficient proof that he was without any hope of recovery; and that I, therefore, ought to reject the evidence.

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Verdict—Not guilty.

GLOUCESTER ASSIZES.

The KING v. KILLMINSTER.

**INDICTMENT** for night-poaching, being armed. The offence was alleged to have been committed four years ago. A bill of indictment had been preferred within a year after the commission of the offence, against the present prisoner and a person named *Robins*, and ignored as to the present prisoner, but found against *Robins*, who was convicted. The present bill of indictment was preferred at these assizes.

Whether the preferring of an indictment against a party for night-poaching, which is ignored, is a commencement of the prosecution within sect. 4 of the stat. 9 Geo. 4, c. 69, so as to warrant the conviction of the party on another indictment preferred four years after the offence, *quære*.

*Watson* objected that it was not within time (a).

- (a) By the stat. 9 Geo. 4, c. 69, offence punishable upon indictment, or otherwise than upon  
s. 4, "the prosecution for every  
red four years after the offence, *quære*.

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COLERIDGE, J.—There are two questions; first, whether preferring a bill of indictment is commencing the prosecution; and, secondly, whether, having commenced it, you have not complied with the condition of the statute. With regard to the first, it is clear that preferring the bill is an act done by the party, which is the commencement of a prosecution. With regard to the second, it is a much nicer point. I had occasion to consider it very much in the case of *Till-Adam v. The Inhabitants of Bristol* (a), which was an action on the stat. 7 & 8 Geo. 4, c. 31, for an injury to property by rioters. That statute said, that the action should be commenced within three calendar months, and there the party had commenced an action within three months. She died, and her executor brought an action within forty days after her death, but more than three months after the damage was done. The point was, whether that action was brought in good time. The argument which I used there was, that the condition had been once complied with, and that the executor had a right to bring an action within a reasonable time. The Court decided against me on that point, and the party failed. I do not feel so clear in this case as to be disposed to put an end to the prosecution, but I will certainly reserve this point, if it should become necessary (b).

The prisoner was acquitted on the merits.

summary conviction by virtue of this act, shall be commenced within twelve calendar months after the commission of such offence."

(a) 4 Nev. & Mann. 144.

(b) By the stat. 8 & 9 Will. 3, c. 26, s. 9, it is enacted, that no

prosecution shall be made for any offence against that act (relating to the coin), unless such "prosecution be commenced" within three months after the offence. In the case of *Rex v. Wallace*, 1 Ea. P. C. 186, the prisoner was indicted for colour-

the coin, to make it resemble. He was on the 5th of May, 1797, found in a room with a false coin, in various stages of process of colouring. He was apprehended, and taken to the gaol, and was afterwards carried before a magistrate, by warrant dated on the 5th of May, was committed to prison, charged on oath "with an offence of high treason, in forging the current money of the kingdom, namely, shillings &c. The assizes at Durham were holden on the 8th of May, so that more than three months had elapsed between the commission of the offence and the issuing of the indictment; the judges, at a conference, unanimously held that the indictment and proceeding before the magistrate was the com-

mencement of the prosecution within the meaning of the act; and that the variance between the manner of laying the offence in the indictment, and charging it in the commitment, made no difference.

In civil cases, where a writ is sued out to prevent the effect of a plea of the Statute of Limitations, it must be regularly continued. And in the case of *Smith v. Bower*, 3 T. R. 662, it was held, that an attachment of privilege was not a continuance of a bill of Middlesex, so as to avoid the Statute of Limitations. The law as to these continuances is materially altered by the statute 2 Will. 4, c. 39, s. 10, set forth in Sewell's Dig. of Prac. 90, where the rules and recent cases on the subject are referred to.

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# KING v. WILLIAM GAINER and JOHN GAINER.

HT poaching. The first count of the indictment stated that the defendants with another person were, on the night of the 21st of November, 1834, in "certain land of one *George Bengough*, called Breadstone Plantation, armed, with intent *there* to destroy game. The second count stated the place to be "certain land called Breadstone Plantation;" and the third count stated it to be "certain land of *George Bengough*."

To sustain an indictment for night poaching, armed &c. the parties must have been in the place charged in the indictment with intent to destroy game, &c. *there*, and it is

sufficient for the prosecutor to convince the jury that the defendants had an intent to destroy game, &c. in the particular place mentioned in the indictment.

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It appeared from the evidence of a witness named *Packer*, that he was out with others on the night of the 21st of November, watching for poachers, and that hearing a gun fired at about a quarter of a mile from Breadstone Plantation, he went into that plantation and sat down under some briars. He further stated, that he saw the two defendants and a third person pass him as he lay there, the defendant *William Gainer* having a gun, and the other two persons bludgeons. In his cross-examination he stated that the night was light, and that there were many pheasants roosting in this plantation, which the defendants must have seen; but that they went through the wood without firing at any of them.

*Greaves*, for the defendant, submitted, that it was not sufficient that the defendants were out on this night for the purpose of poaching, but that the jury must be satisfied that they were in this particular plantation with an intent to kill game there,—an intent which was negatived by the fact of their seeing the pheasants and not firing at them.

COLERIDGE, J., (in summing up).—You must say whether these persons were in this particular cover, called Breadstone Plantation, with an intent to kill game there. If you can suppose that they had gone out on that night poaching in every other cover in the county, that will not be sufficient to support the charge contained in this indictment, if they were not in this particular cover with intent to destroy game there. It lies on the prosecutor to make out to your satisfaction that the prisoner had an intent to kill game in this particular cover. The intent can in this case only be inferred

from the conduct of the parties; and it is here shewn that there was game which the defendants must have seen, but did not make the slightest attempt to destroy.

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Verdict—Not guilty.

HEREFORD ASSIZES.

The KING v. WHITNEY.

**INDICTMENT** against the parish of Whitney, for non-repair of a highway.

The indictment stated that there was a certain highway leading from the village of Eardisley to Gravesend; and that a certain part of the said common highway, commencing at a certain well and leading unto a certain cottage, containing in length 374 yards, on the 1st January, 1834, &c., was very ruinous, broken, and in great decay, for want of due reparation and amendment, so that the liege subjects of our said lord the king, during the time last aforesaid, could not go, return, pass and repass, &c. along the said highway, as they ought and were wont to do.

On an indictment against a parish for non-repair of a highway, a plea of guilty to a former indictment against the same parish for non-repair of the same highway, is conclusive evidence that it is a public way.

Evidence that a parish did not put guard fences at the side of a road, is not receivable on an indictment which charges that the king's subjects could not pass as

On the part of the prosecution, *R. V. Richards* put in an examined copy of a previous conviction, in 1830, of the defendants for not repairing the same road, and submitted that it was conclusive evidence that it was a

"they were wont to do," if no such fences existed before.

*Seemle*, that an arch of nine feet span, without battlements at either end, over a stream usually about three feet deep, is a culvert, and not a bridge, to be repaired by the county; and if the parish have pleaded guilty to a former indictment, which described it as a part of the road, they are concluded by having so done.

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public highway. On that occasion the defendants had first pleaded not guilty, and afterwards withdrawn their plea, and pleaded guilty.

*Talfourd*, Serjt., for the defendants. The record is not conclusive. We are entitled to shew that the parish acted under a mistake. This road was set out under an inclosure act, passed in 1831, but it never has been certified to be in a proper state according to the 41 *Geo. 3*, c. 109, s. 9; it therefore never became a public road; and we are entitled to shew that fact. The case of *Rex v. Edmonton (a)* is very similar to the present.

PARK, J.—I think the evidence is conclusive. The parish had ample time on the former occasion to inquire into all the facts. They first pleaded not guilty, and afterwards obtained leave to withdraw that plea, and plead guilty: after doing so, I think they cannot be permitted to controvert the fact that the road is a public road; but I will take a note, and the defendants may move, if they think fit.

*R. V. Richards* proposed to examine witnesses to shew that there were precipices on the sides of the road, and that there were no fences or guards to protect the passengers against such precipices, and also to shew that there was a culvert without walls at its ends.

(a) 1 M. & Rob. 24. In that case a road had been used by the public for more than twenty years, and had been repaired by the parish, but there had been no owner who could dedicate it to the public. Lord *Tenterden*, C. J., left it to the jury to say whether the parish had repaired

the road under a mistaken notion of liability; and intimated that, if they had acted, not on a mistake, but on a voluntary disposition to repair a road which was useful and for the convenience of the public, they ought to be convicted.

*Talfourd*, Serjt., and *Greaves*. This evidence is not admissible on this indictment, which only charges defect of repair in the road itself. No parish can be compelled to erect guards against precipices where none have existed before. Here none ever existed, and therefore no indictment will lie for not erecting such guards. No instance of any such indictment can be shewn; and the numerous instances where no guards exist on the most public and frequented roads, affords a strong argument that none will lie. If the public adopt a road in a particular state, they cannot complain of its not being in a safer state. If a road be so narrow that it is even dangerous, no indictment will lie to compel the parish to widen it. In the case of *Rex v. Devon* (a), it was held, that the inhabitants of a county are not bound to widen a public bridge; and, by parity of reason, no indictment will lie for not guarding a road. At all events, this evidence is not admissible here; for all that is charged is, that the road is not in such a state as it was wont to be. To support that, there must be evidence that such guards previously existed.

*R. V. Richards* and *M'Lean*, for the prosecution. The indictment comprehends every thing that renders the road dangerous and unfit for the passage of the public. Now the guards of the road are as necessary as the repair of the body of the road itself. They are, therefore, comprehended in this indictment.

*PARK, J.*—I am of opinion that this evidence is not admissible. The indictment alleges that the public could not pass as they ought and were wont to do. But there is no evidence of any fences before. The

(a) 7 D. & R. 147; 4 B. & C. 670; 3 Dowl. & Ryl. Mag. Ca. 346.

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public are, therefore, in no worse a situation now than they were wont to be before on account of the want of fences.

*R. V. Richards.* Suppose I shew that after the former indictment some fences were put up?

PARK, J.—I think that will not alter the case. It must be “wont and accustomed.”

It appeared that the road in question passed over a stream of water, which fed a mill; and that over this stream, which was usually about three feet deep, but occasionally shallower, and in floods much deeper, there was an arch of nine feet span, but it had no battlements at either end; it was marked on the keystone 1762, and it was spoken to as existing before 43 Geo. 3. The witnesses for the prosecution stated that the arch in question was a culvert, and not a bridge; and that the want of battlements constituted the difference between a bridge and a culvert.

*Talfourd, Serjt., and Greaves.* This is a bridge, and not a culvert. It is a mere question of law, and not of fact. The case of *Rex v. The Inhabitants of Oxfordshire* (a) shews that every thing necessary to constitute the legal meaning of a bridge exists here. Here is an arch over a stream of water, flowing between banks more or less defined. It is impossible to say that the want of battlements prevents it from being a bridge.

(a) 1 B. & Ad. 289. In that case it was held, that a bridge, to be repaired by the county, must be over water, flowing in a channel between banks more or less defined, although such channel may be occasionally dry.

pose, instead of being nine feet wide, it were fifty, over the Severn, it could not certainly be called a pert. The depth and uncertainty of the stream shew it is such a one as requires a bridge over it, in order enable the public to pass; and that being so, the county are primarily liable to repair it. If that be so, the bridge, together with 300 feet at each end of it, to be taken as if they were struck out of the road. If then the description in the indictment is not proved, the indictment charges the road as a continuous road, from the well to the cottage; whereas it ought to have been described as the road in question to extend from the well to the commencement of 300 feet from the end of the bridge, and to extend from the end of 300 feet from the other side of the bridge to the cottage. Suppose the 300 feet had been in another parish, the variance would probably be fatal. Now this portion being repairable by the county, is just as if it were in another parish.

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2. *V. Richards and M'Lean.* As to whether or not it is a culvert, the former indictment is conclusive evidence. It was there indicted as a road; and the defendants are not now at liberty to deny that fact. If it is a culvert, then the defendants are bound to repair it as a part of the road. That being so, then the other question does not arise. But assuming that it is a bridge repairable by the county, then the defendants may be convicted for not repairing the residue. It is a matter of description, and proof of less than what is charged will suffice.

PARK, J.—I should say it is a question for the jury. If you throw it upon me, it is, I think, a culvert, and not a bridge; and such a culvert as the county are

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not bound to repair. If I am to say whether such a thing as this is a part of the road, I am of opinion that it is. I think also that you have concluded yourselves by the former indictment, but you may move, if you please.

Verdict—Guilty (a).

(a) No motion was made.

### HERTFORD ASSIZES.

The KING v. TOTTENHAM and CORNELL.

A stack, of which the lower part consists of cole-seed straw and the upper part of wheat stubble, is not a stack of straw; and the setting it on fire is, therefore, not a capital offence within the stat. 7 & 8 Geo. 4, c. 29, s. 17.

**BURNING.** The indictment charged that the prisoners set fire to "a stack of straw," the property of *John Monk*.

It appeared that the stack in question consisted in the lower part of cole-seed straw (a), and in the upper part of wheat stubble.

*Ryland*, for the prisoners, objected that this was not a stack of straw within the meaning of the stat. 7 & 8 Geo. 4, c. 30, s. 17.

*GASELEE*, J., (having conferred with Lord DENMAN, C. J.)—We are of opinion that the objection is fatal. The prisoners must be acquitted.

Verdict—Not guilty.

(a) Colewort is a species of cabbage.

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## BEDFORD ASSIZES.

REX v. TAYLOR and PENWRIGHT.

THE prisoners were indicted for feloniously assaulting and wounding certain gamekeepers of Sir *John Osborne*, in certain preserves in Oxley Wood, in order to prevent their lawful apprehension. There were also counts, charging the intent to be to do the gamekeepers some grievous bodily harm, &c.

It was proved, that between twelve and one in the night, the keepers heard two guns fired, and ran in the direction in which the sound came, and saw the two prisoners in the wood. Neither gun nor game were found upon either of the prisoners or near them. The keepers did not say any thing to the prisoners before they seized them, and neither party had seen the other before. The prisoner *Taylor* struck one of the keepers with some instrument, and seriously injured and wounded him. A scuffle then took place between both prisoners and the keepers, which lasted for a quarter of an hour.

*Smith*, for the prisoners, submitted, that as there was no proof of the authority of the gamekeepers being notified to the prisoners, or of their being called on to surrender, or of their being in pursuit of game, it was to be taken that what was done was done in self-defence, or at the most, that if death had ensued, it would only have been manslaughter, and therefore the prisoners could not be convicted upon this indictment.

*Gunning* and *Byles*, for the prosecution, contended, that there was enough to warrant the apprehension of the prisoners and to sustain the indictment.

Gamekeepers being in a preserve between twelve and one at night, heard the firing of two guns, and proceeding in the direction of the sound, met with two persons, who neither had guns nor game upon them, nor were either found near them. The gamekeepers immediately seized them, without calling on them to surrender, or in any way notifying to them who they were. The keepers were wounded, one of them seriously:—Held, that the prisoner who wounded them might, under the circumstances, and taking into consideration the situation and the time of the night, &c. be properly convicted under the stat. 9 Geo. 4, c. 31, ss. 11 & 12.

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And of this opinion was Mr. Justice VAUGHAN; and  
 under his direction the prisoners were found

Guilty.

—◆—  
 REX v. JOSEPH WALTER.

A magistrate returned, with the depositions taken before him, that the prisoner said—"I decline to say any thing;"—Held, that under these circumstances, a witness for the prosecution could not be allowed to give evidence of the terms of a confession, which, he stated, the prisoner made in the presence of the magistrate, and while under examination.

THE prisoner was indicted for stealing four sacks of clover seed.

The prosecutor stated that the prisoner, when under examination in the presence of the magistrate, made a confession of his guilt, and was about to state it.

Lord ABINGER, C. B., on referring to the depositions returned by the magistrate, found that the prisoner was there stated to have said—"I decline to say any thing;" and upon this, his lordship was of opinion that the prosecutor's statement could not be received in evidence; but the other evidence in the case being sufficient, the prisoner was found—

Guilty.

In *Rex v. Harris and others*, R. & M. C. C. R. 338, it was held that parol evidence might, under the particular circum-

stances of that case, be given to add to the written examination of a prisoner before the magistrate.



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## NORWICH ASSIZES.

## REX v. FULLER and TAYLOR.

THE prisoners were indicted for a highway robbery. After a long case of alibi had been proved on the part of the prisoners—

It is the duty of the magistrate to return all the depositions taken against a prisoner, and not merely the depositions of those whom he thinks proper to bind over as witnesses.

*Palmer*, for the prosecution, called the clerk to the magistrates to produce, for the purpose of contradiction, the deposition of a witness whose name was not on the back of the bill, but who had been called on the part of the prisoners to prove the alibi.

*Prendergast* and *Byles*, for the prisoners, inquired why that deposition had not been returned with the others.

The clerk replied, that he never returned the depositions of persons who were not bound over; and added, that he was directed by the magistrates not to return them.

VAUGHAN, J.—It is very wrong to withhold any of the depositions taken before the magistrate; all the depositions taken ought to be returned, whether the witnesses who made them were bound over or not (a).

(a) See the observations of Mr. Baron *Alderson* on this subject, in the case of *Rex v. Simons*, 6 Carr. & Payne, 540; ante, vol. ii. 598. The statute 1 Geo. 4, c. 6, s. 1, provides "that nothing herein contained shall be construed to require any such justice or justices to hear evidence on behalf of any person so charged as aforesaid, [i. e. charged with felony or suspicion of felony,] unless it shall appear to him or them to be meet and conducive to the ends of justice to hear the same." This proviso leaves it in the discretion of the magistrate, either to hear the

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evidence of the prisoner's witnesses or not. We would however suggest, that in all cases it is highly advantageous that the prisoner's witnesses should be examined before the magistrate, and their depositions returned to the judge; and this for two reasons:—first, because it would

give the prisoner an opportunity of applying to the judge the deposition read in case he died before the trial; secondly, because it would put a great check upon false witnesses, by improving their tale between the time of the examination and the time of the trial.

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WORCESTER ASSIZES.

REX v. PASSEY, MEADOWS, and others.

*Semble*, that in case of night-poaching, all who are at the place, each acting his part with a common intent, are equally guilty, although some only are bodily upon the land:—Held, that those who are watching at the outside of a preserve for the purpose of giving the alarm on the approach of the gamekeeper, to others who are in the preserve, and who afterwards go into the preserve for that purpose, are equally guilty with those who enter the preserve at first.

**NIGHT-POACHING.** The indictment charged the defendants, four in number, were, on the 5th of December, 1835, night-poaching, (some of them being a) in a wood called Norton Hill Wood, the property of *Charles Edward Hanford, Esq.* In another count an offence was charged to have been committed on land in the occupation of *Richard Rimmell*.

It appeared from the evidence of an accomplice *William Smith*, that all the defendants went to a place called Norton Hill Wood, for the purpose of shooting pheasants; and that all of them, excepting himself, the defendant *Meadows*, went into the wood, they remaining outside; and on the approach of Mr. Ha gamekeepers, the witness and the defendant *Meadows* went into the wood and informed the other defendants, when they all ran away together. The land in the wood was in the occupation of *Richard Rimmell*.

*Carrington*, for the defendants. I submit that the defendant *Meadows* must be acquitted. He never entered the wood for the purpose of destroying game

He only entered the wood when the poaching was over, and when they all ran away. The words of the statute 9 *Geo. 4*, c. 69, are, "shall enter or be on any land."

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*F. V. Lee*, for the prosecution. There is a count which charges the offence to have been committed on the land outside of the wood, and all the prisoners were together there.

*Carrington*. That is so; but none of the party ever intended to kill any game on that land.

ALDERSON, B. (in summing up.)—The entering on the land by one is to be considered as the entering of all, if the others are at the place and assisting. Exactly in the same way, that would fix them in a case of burglary—there, all are guilty, as well those who actually enter the house as those who are close at hand on the outside of it, waiting to watch or to carry off the property. It is enough if all these persons were at the place, each of them acting his part, and conducing to one common intent, although some only of the party were bodily in the wood. That being so, you will consider whether the accomplice and the defendant *Meadows* were not watching outside the wood, which they both afterwards entered, and where they joined the rest of the party for the purpose of giving an alarm to the other defendants, on the approach of the gamekeepers; and if you think that was so, you will find the defendant *Meadows* guilty, as well as the others who were originally in the wood; but if you think that he remained out of the wood for any innocent purpose, and not for the purpose of aiding those who were in it, then you will acquit him.

The jury found all the defendants guilty.

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## STAFFORD ASSIZES.

## ADDISON and others v. ROUND.

Churchwardens and overseers have not such a property in the account books of a late surveyor of the highways as to enable them to maintain trover for them, and their remedy is under the stat. 13 *Geo.* 3, c. 78, s. 48. A late surveyor of highways, on his account books being demanded of him at the vestry, said, "I have not got them, I have delivered them to my brother J.," and his brother J. in his presence said, "I have them, and I will keep them." J. was one of the overseers of the poor of the parish:—Held, in an action of trover against A.,

that this was no evidence of a conversion by A., as the overseer is a person to whom the books are to be delivered under the stat. 13 *Geo.* 3, c. 78, s. 48, and the judge will not leave it to the jury to say whether this delivery over was colourable only.

**TROVER** by the churchwardens and overseers of the poor of the parish of Wednesbury against the defendant, who, from the year 1826 to the year 1832, was surveyor of the highways of that parish, to recover the assessments, rate-books, and account-books appertaining to the highways of that parish during the time the defendant was in office. Pleas: first, not guilty; second, that the plaintiffs were not possessed of the books, &c. as of their own property; thirdly, the Statute of Limitations.

It was opened by *Ludlow*, Serjt. for the plaintiffs, that the defendant was appointed surveyor of the highways in the year 1826, and continued in office till the year 1832; and that by the statute 13 *Geo.* 3, c. 78, s. 48 (a), he was bound to deliver the account-books to one of the churchwardens or overseers of the poor of the parish; the statute 58 *Geo.* 3, c. 69, s. 6 (b), further directing that the accounts of the surveyor should be deposited in such place as the vestry should appoint. [*Alderson*, B. The defendant probably bought the books themselves; and there is a statutable mode for the recovery of them, which, if properly enforced, would have put them into the possession of the churchwardens and overseers; and, when they have them, the Vestry Act applies and points out the mode of depositing them.]

(a) Set forth in Chittys' Burn's Just. tit. "Highways."

(b) Set forth in Chittys' Burn's Just. tit. "Poor," sect. ii. div. 12, p. 76, edit. 1836.

Does your lordship think that the plaintiffs cannot maintain trover? [*Alderson*, B. Supposing that the Highway Act had given no power of compelling the books to be delivered up, the case would stand thus:—the defendant purchases a book for himself with his own money, and makes entries in it: that does not make it the property of the parish. My present impression is, that you have opened a nonsuit on the second plea; but I must try the first issue for the question of costs, as the first plea admits the property.]

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To prove a conversion, *Mr. Danks* was called; he said, “I was at a vestry-meeting in January, 1833. The defendant was there, and the books were demanded. The defendant said that he had not got them; but had delivered them to his brother *Joseph*, who immediately said, ‘I have them, and I will keep them.’” *Mr. Joseph Round* was then one of the overseers. Other evidence was given with a view of proving a conversion, but it did not carry the case further.

*ALDERSON*, B.—This is no conversion, as the evidence stands. The surveyor delivers the books to one of the overseers.

*Ludlow*, Serjt. On these pleas, the defendant cannot avail himself of this delivery; he should have pleaded it. [*Alderson*, B. Can you make the delivery of these books to *Joseph Round* a conversion? I should say not; because a literal compliance with the act of parliament certainly cannot be a conversion.] May not a conversion depend on the finding of the jury as to the complexion of particular facts? The delivery may only have been colourable, as *Mr. Joseph Round* has not delivered them over.

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ALDERSON, B.—That would be the fault of *Joseph*. There are two points in this case—the one as to the conversion, the other as to the property. I am against you upon both. But as the conversion is a question of costs, I will give you leave to move to enter a verdict for the plaintiffs on that issue.

Nonsuit.

In the ensuing term, *Ludlow*, Serjt. applied to the Court of King's Bench to set aside the nonsuit; but the Court refused a rule on both points, being of opinion that the plaintiffs had not such a property in the books, &c. as would entitle them to maintain trover; and also that there was no proof of any conversion.

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REX v. LOCKETT.

On an indictment for night-poaching by four, one being armed, *semble*, that if two enter the land laid in the indictment, and the other two remain outside the preserve, but are of the same party, and are there for the same purpose, all ought to be found guilty.

NIGHT POACHING.—The defendant was indicted for night poaching, with three other persons, on land of the *Duke of Sutherland*, one of them being armed.

On the evidence it was contended, that one or two of the poachers were not actually in the *Duke of Sutherland's* preserve, but that they were waiting at the outside to watch.

*Greaves*, for the defendant, submitted that the jury must acquit, unless three of the persons were in the wood.

ALDERSON, B.—If two persons were in the wood, and the other two outside were of the same party, and there for the same purpose, it would be an offence within the act.

*Greaves* submitted, that to support the indictment three persons must be together in the same place, for the purpose of destroying game there, and that that must be the identical place laid in the indictment. He cited the case of *Rex v. Dowsell* (a).

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ALDERSON, B.—With all the respect I feel for my brother *Patteson*, I own I am of a different opinion. It is, however, not clear to me that the case of *Rex v. Dowsell* was decided on that ground. I concur in that acquittal. This, however, is like the case of a burglary, where, if a man stand on the outside of the house, so near as to render assistance to those who are breaking open the house, he is equally guilty with them.

*Greaves*. I submit that the distinction between that case and the present is, that that case is at common law, and this on the express terms of a particular statute, which requires that persons, “to the number of three or more together,” shall enter or be in the place laid in the indictment; and the object of the statute was to protect gamekeepers from being overpowered by parties of three or more together.

ALDERSON, B.—Suppose that some of the party were to go down one side of the hedge and some down the other, beating the same fence, that would be no offence within the statute, according to this decision; and the same consequence would follow if two went into the wood and a number of others surrounded the outside. Surely this statute meant to include such cases. I have a strong opinion on the point; but out of respect

(a) 6 Car. & Payne, 398.

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for my brother *Patteson's* opinion, if the question arises, I will reserve the point.

Verdict—Guilty; the jury finding that all had entered the wood.

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SHROPSHIRE ASSIZES.

REX v. POUNTNEY and another.

*A.*, being in the custody of a constable, on a charge of felony, was taken by the constable to an inn, where the inn-keeper, in the hearing of the constable, held out an inducement to *A.* to confess; and *A.*, in the hearing of the constable, made a confession to the innkeeper, which, at the trial, the constable was called to prove:—*Seemle*, that this confession was not receivable in evidence.

**HOUSE-BREAKING.**—The prisoners were indicted for breaking into the house of *John Garbett*, and stealing money.

On the part of the prosecution, the constable who took the prisoner *Pountney* into custody, was called to prove a confession made by the prisoner to the landlord of the inn, to which he was taken immediately after his apprehension. It appeared that the constable was present and had the prisoner in his custody when the confession was procured by inducements held out by the innkeeper, and that the constable, who was present, did not caution the prisoner in any way.

*F. V. Lee* for the prisoner.—I submit that this confession is not receivable in evidence. I am aware that, as a general rule, a confession procured after inducements held out by an unauthorized person is receivable; yet, here, as the prisoner was in the actual presence and custody of the constable at the time of the procuring of the confession, the constable must be considered as giving his authority to, and adopting, by his silence, the inducements by which it was procured; and, if so, it is certainly not receivable in evidence. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from a sense of guilt; but a confession procured by such means as those used in the

present case is of so questionable a nature as to be very unsafe to rely upon.

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ALDERSON, B.—This is a point well worthy of consideration. I have a very strong opinion against its admissibility; but as there are opinions which I am bound to respect opposed to my own, I think I had better receive the evidence; and, if it should become necessary, I will reserve the point for the consideration of the judges.

The evidence was received.

The prisoners were acquitted on the merits.

*GLOUCESTER ASSIZES.*

REX v. THOMAS HEMS.

THE prisoner was indicted for maliciously cutting *Joseph Parry*, who was one of the Cheltenham police, with intent to murder him. The indictment contained the usual counts, laying an intent to do grievous bodily harm, &c. It appeared, that at about twenty minutes to twelve o'clock at night, on the 10th of September, the prosecutor was called into a beer house, and desired to clear the house, which he did, of a number of persons who were there assembled. Having done so, he went into the street, and there the prisoner and many others were standing near the door, when the prisoner refused to go home, and used very abusive and violent language; the prosecutor laid his hand on his shoulder gently, and told more him; and if he cut the police constable with a knife, with intent to do grievous bodily harm, this is a capital offence; and the fact of the police constable having laid hands on the party, would not have reduced the crime to manslaughter, if death had ensued.

If a police constable, on being sent for at a late hour of the night to clear a beer-house, do so, and one of the persons on leaving the house, and being told to go away, refuse to do so, and use threatening language, the police constable is justified in laying hands on him to re-

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him to go away, on which the prisoner immediately stabbed him in the throat with a knife. The defence attempted was, that the prosecutor had previously struck the prisoner.

WILLIAMS, J., (to the jury.)—If a policeman is called upon to send guests away from a public-house, who may be disorderly or unwilling to go, if he does send them away, he is doing nothing but what is within the line of his duty, and what is perfectly necessary for the preservation of order. Twenty minutes to twelve o'clock at night is a time at which it is convenient and right that a public-house should be cleared; consequently, if a policeman had heard any noise there, he would have acted within the line of his duty if he had gone in, and insisted that the house should be cleared; and much more so, if he was required by the landlady: and after that was done, if a knot of people remained in the street, and the crowd increased in consequence of their attention being drawn to the clearing of the house, and if any thing was saying or doing likely to lead to a breach of the peace, the policeman was not only bound to interfere, but it would have been a breach of his duty if he had not done so. One great use of these police constables is to prevent mischief in the bud, and to interfere as early as possible before it breaks out; and if in so doing he ordered the people to go away, and any one was unwilling, and defied the policeman, and used threatening language, the policeman was perfectly justified in insisting upon that person going off; and if he had warned him several times, and he would not go away, and use threatening language, if any one ventured to touch him, the policeman was entirely justified in using a degree of violence to push him from the place, in order to get him to go home; and therefore any thing

that he did would not be in the nature of an assault, but would be an act in the discharge of his duty, and therefore, any blow that was given afterwards by a cutting instrument, would be precisely the same as if it had been given without any thing being done by the policeman.

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Verdict—Guilty.

REX v. JAMES LONG.

**ASSAULT.**—The first count charged the prisoner with assaulting *Thomas Webb*, in the execution of his duty as a gamekeeper to the *Duke of Beaufort* (a). The second count was for a common assault on *Thomas Webb*.

*Thomas Webb* said, I am gamekeeper to the *Duke of Beaufort*. On the 28th of February last I saw the defendant tracking hares in the snow in several fields in the manor for which I am keeper. I concealed myself in a road behind a gate; the defendant came close up to it; I got up and said, ‘What sport have you had?’ He said, what odds is that to you. I said, if I could catch hold of you, I would let you know. He turned and ran away. I directly followed after him; when I got within ten yards of him, he began pulling the stock of a gun out of one of his pockets, and the barrel out of another. He then held the gun up in a threatening attitude; I went up to him, and he lowered the gun, and said, I will go with you. We went back together to the road. I then said, I should like to know your name. On that he went across the road, and tried to get over the wall. I caught hold of him, and pulled him back, and said,

To justify the apprehension of a person under the 31st sect. of the Game Act, 1 & 2 Will. 4, c. 32, he must have been required to quit the land, and to tell his name; and the “wilfully continuing or returning upon the land,” to justify an apprehension, must be upon the same land, and for the purpose of pursuing game there.

(a) This count, as the assault was not committed in the night, was not framed on any statute, and does not authorize any greater punishment than a count for a common assault.

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there is no road that way. A scuffle ensued ; I threw him down, and fell on him. He got up again, and we scuffled, and I threw him down again. Before I would let him get up again, he said, I will go along with you. I got the barrel of the gun from him. We went about a yard together. He then tripped me up, and laid hold of the barrel, and put his foot on my throat till I was nearly choked. He then got the barrel away, and hit me on the head with it. The land on the other side the wall is in the same manor as that where I first saw him.

*Greaves*, for the defendant. The first count is not proved. No deputation is put in, pursuant to the 13th section of the 1 & 2 Will. 4, c. 32 ; and there is no proof of inrolment pursuant to s. 13 of the same act, without which, even if there were a deputation, it would be void. Then, on the second count, the defendant is entitled to an acquittal. The keeper had no authority to apprehend ; even if the gun had been actually used, there would still be no power in the gamekeeper to apprehend the defendant. That being so, the prosecutor's laying hold of the defendant when he was getting over the wall, was an assault on him, and justified the struggle that he made ; and as he was only allowed to get up on promising to go along with the keeper, although he afterwards tripped up the keeper, and struck him, he was justified in doing so, for he had a right to use as much force as was necessary to liberate himself from the illegal restraint which was put upon his person. *Rex v. Thompson* (a) is a similar case, where a person stabbed another in order to free himself from an illegal arrest ; it was held, that he was only guilty of manslaughter. The defendant, therefore, in this case, is entitled to be acquitted.

(a) 1 R. & M. C. C. R. 80.

*Talbot* for the prosecution. The 31st section of the Stat. 1 & 2 Will. 4, c. 13, gave authority to the keeper to apprehend the defendant; for the keeper was the servant of the *Duke of Beaufort*, and the defendant refused his name. Besides, as the land over the wall was within the same manor, he had a right to apprehend him as he was returning upon it again.

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*Greaves*. The 31st section, which authorizes a person to require the trespasser to quit the land, *and* tell his name, only gives power to apprehend "after being so required." Here he was not required to quit the land. The keeper, therefore, did not do enough to give himself that power, and the defendant did not return upon the land within the meaning of that section. The return must be upon the *same* land, *and* for the purpose of pursuing game. The words "continuing or returning upon the land," necessarily mean that the return must be upon the same land as the party was found upon: "continuing" cannot be otherwise understood, and so, therefore, must "returning." The return must also be for the same purpose, otherwise a man going over the same land along a road, or for any other similar purpose, would come within the section.

WILLIAMS, J.—I think all the objections are good in point of law; but still it seems to me that I cannot help leaving the case to the jury, in order that they may say whether the defendant used more violence to *Webb* than was necessary, for the purpose of effecting his escape.

*Greaves* then addressed the jury on that point.

Verdict—Not guilty.

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By the stat. 1 & 2 Will. 4, c. 32, s. 31, it is enacted, "That where any person shall be found on any land, or upon any of his majesty's forests, parks, chases, or warrens, in the day-time, in search or pursuit of game, or woodcocks, snipes, quails, land-rails, or conies, it shall be lawful for any person having the right of killing the game upon such land, by virtue of any reservation or otherwise, as herein-before mentioned, or for the occupier of the land (whether there shall or shall not be any such right by reservation or otherwise), or for any game-keeper or servant of either of them, or for any person authorized by either of them, or for the warden, ranger, verderer, forester, master-keeper, under-keeper, or other officer of such forest, park, chase, or warren, to require the person so found forthwith to quit the land whereon he shall be so found, and also to tell his christian name, surname, and place of abode; and in case such person shall, after being so required, offend by refusing to tell his real name or place of abode, or by giving such a general description of his place of abode as shall be illusory for the purpose of discovery, or by wilfully continuing or returning upon the land, it shall

be lawful for the party requiring as aforesaid, and any person acting by and in his aid, to apprehend the offender, and to convey him to be conveyed as conveniently may be to a justice of the peace; and the offender, (whether so apprehended or not), upon being brought before any such justice of the peace, shall pay such sum of money, not exceeding five pounds, as the justice shall meet, together with the costs of the conviction: Provide that no person so apprehended shall, on any pretence, ever, be detained for a longer period than twelve hours after the time of his apprehension, until he shall be brought before some justice of the peace; that if he cannot, on account of the absence or distance of the residence of any such justice of the peace, or owing to some reasonable cause, be brought before a justice of the peace within such twelve hours as aforesaid, then the person apprehended shall be detained, but may, nevertheless, be proceeded against for his offence by summons or warrant, in conformity to the provisions herein mentioned, as if no such apprehension had taken place

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## HAVERFORDWEST ASSIZES.

## REX v. PILLER.

NDING. The prisoner was indicted for having committed a felony by committing in that part of the county of a town which has been added to it by the Boundary Act, 2 & 3 Will. 4, c. 64, and the Municipal Reform Act, 5 & 6 Will. 4, c. 76, it is triable in the county of the town.

d *Margaret Piller* with intent to do her grievous harm. The prisoner was tried before a jury of the county of the borough of Haverfordwest, which is a town of itself. It appeared that the offence was committed at a place called Prendergast, which was added to the borough of Haverfordwest by the Boundary Act, 2 & 3 Will. 4, c. 64, schedule O, 50, and declared by the Municipal Reform Act, 5 & 6 Will. 4, c. 76 (a), to be a town of the borough, the place in question not being a town in the county of the borough of Haverfordwest at the time of the passing of those acts.

BRIDGE, J.—I entertain some doubt as to the jurisdiction in this case.

*Holl, amicus curiæ*, referred to the case of *Rex v. Justices of Gloucestershire (b)*.

by the Municipal Reform Act, 5 & 6 Will. 4, c. 76, s. 7, enacted, that after the passing of this act (Sept. 9, 1835,) the metes and bounds of the boroughs named in the schedule A. of that act, (one of which is Haverfordwest), for the purposes of that act, shall be the metes and bounds by which they are settled and defined in the Boundary Act, 2 & 3 Will. 4, c. 64, and remain the same as parliament

shall otherwise direct; and by sect. 8 of the Municipal Reform Act, it is enacted, "That every place and precinct which shall be included within the metes and bounds of any borough as hereinbefore mentioned, and none other, shall be part of such borough; and in those boroughs which are counties of themselves, shall be part of such county, and none other."

(b) In that case there had been an order for stopping a

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COLERIDGE, J. then directed the trial to proceed, and the prisoner was acquitted on the merits.

highway at Clifton, made after the month of September, 1835, which the justices at the Gloucester quarter sessions refused to enrol and confirm, on the ground that Clifton, by the Boundary Act before cited, schedule O. 30, and the Municipal Reform Act, had been made a part of the county of the city

of Bristol. *Greaves* applied for a writ of mandamus; and the Court of King's Bench, after hearing cause shewn by *Campbell*, A. G., and *Maule*, discharged the rule, holding, that since the statutes above referred to, Clifton was for all purposes now to be considered a part of the county of the city of Bristol.

—◆—  
*Adjourned Sittings at Westminster after Hilary Term,*  
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#### HOPKINS v. CROWE.

If *A.*, having no right to apprehend *B.*, direct a police officer to take *B.*, and he do so, *B.* may maintain an action for false imprisonment against *A.*; but if *A.* merely make a statement to the officer, leaving it to him to act or not as he thinks proper, and the officer then take *A.*, *B.*'s remedy against *A.* is (if any) by action on the case.

**FALSE imprisonment. Plea: Not Guilty.**

It appeared that the plaintiff was the driver of a hackney cabriolet, and that on the night of the 30th of September, or the morning of the 1st of October, he brought the cabriolet, and the horse which drew it, to the stables of his employer, who was the owner of the cabriolet and horse, and that the defendant, who acted as principal ostler there, found fault with the plaintiff for bringing home no money, and said that the plaintiff had ill-treated the horse. It further appeared, that on *Andrew John-*

If a person who has ill-treated a horse be apprehended by one who is neither the owner of the horse nor a peace officer, the person so apprehending is not entitled to notice of action under the 19th sect. of the stat. 5 & 6 Will. 4, c. 59.

If, under that stat. s. 9, a peace officer be required by another person to take a third person into custody for cruelty to a horse, not committed in the officer's own view, the officer, before taking the party into custody, should either inquire into all the particulars, or should see the animal, so as to form a judgment as to what has occurred.

police constable, coming up, the defendant again at the plaintiff had brought home no money, and treated the horse; upon which the police constable, "I can take no charge about the money, but will give him in charge for ill-using the horse, I see him." To this the defendant replied, that he was the plaintiff in charge, and the police constable took the plaintiff into custody, and the case being tried into on the next day before Mr. *Hoskins*, the rate, the charge was dismissed.

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*F. Pollock*, for the defendant. I submit that the *Writ* must be nonsuited on two grounds: first, that none of the action should have been in case, and not to pass, as the defendant did not take the plaintiff into custody, but merely set the law in motion by causing a police officer to take him; and secondly, I submit the defendant was entitled to notice of action under 9 of the last act of parliament for preventing cruelty to animals (*a*), as the defendant was intending to order the provisions of the 9th section of that act (*b*), which relates to the apprehension of offenders who have been guilty of cruelty to animals.

& 6 Will. 4, c. 59. This is in the usual form of relative to notice of ac-

by which it is enacted, when and so often as any such offences shall happen, and may be lawful for or constable or other peace officer for the owner of any cattle or animal, upon view or upon the information of any other person (who declare his, her, or their

name or names, and place or places of abode to the said constable or other peace officer), to seize and secure by the authority of this act, and forthwith and without any other authority or warrant to convey any such offender before any one justice of the peace within whose jurisdiction the offence shall have been committed, to be dealt with according to law, and such justice shall forthwith proceed to examine upon oath any witness or

Sir *F. Pollock*. The clauses relating to not action have been always held to apply to cases where the parties intended to act under the provision of the statute, but have done wrong either from a slight or an excess of jurisdiction. That was decided in the cases of *Pratt v. Hillman* (a), and *Wells v. Ody* (b).

LORD DENMAN, C. J. (in summing up).—If the defendant directed the police officer to take the plaintiff into custody, he is liable in the present action for false imprisonment; but if he merely made his state-  
ment to the constable, leaving it with the constable to act as he thought proper, that is, if the defendant said, “You may take him if you think proper,” the defendant will not be liable, at least not in this action. Police officers are quite wrong to take a person into custody merely because another says, “He cruelly used my horse.” They should either inquire into all the particulars, or else they should see that the complaint is well founded, so as to form a judgment as to what has occurred. If the defendant gave the plaintiff in charge to the police officer, your verdict ought to be for the plaintiff; but if the defendant was not the owner of the horse,

opinion that he was not entitled to notice of action, as, not being the owner, he could have no right to apprehend an offender.

Verdict for the plaintiff.

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In the ensuing term, Sir *F. Pollock* applied for a new trial, but the Court refused a rule.

### CENTRAL CRIMINAL COURT.

REX v. JORDAN, SULLIVAN, MOTT, and SEALE.

THE first count of the indictment charged the prisoners *Jordan* and *Sullivan*, and another man named *May* (a), with breaking and entering the dwelling-house of our Lord the King, in the parish of Saint Dunstan in the East, and stealing therein a quantity of bank notes and sovereigns to the amount of nearly 4000*l.*, some the property of his Majesty, some the property of a person named *Walsh*, and some the property of a person named *Billings*. In the second count the locus was described as the dwelling-house of *Elizabeth King Kelly*; and in the third, as a counting-house of our Lord the King. The charge against the prisoners *Mott* and *Seale* was, "that they before the said felony was committed, to wit, on the 27th November, 1834, feloniously and maliciously

(a) *May* was not in custody, having absconded, and not being to be found.

was held, that the two were in law parties to the breaking and entering, and were answerable for the robbery which took place afterwards, though they were not near the spot at the time when it was perpetrated.

In burglary, where the breaking is one night, and the entry the night after, a person present at the breaking, though not present at the entering, is in law guilty of the whole offence.

A room-door was latched and one person lifted the latch and entered the room and concealed himself for the purpose of committing a robbery there, which he afterwards accomplished. Two other persons were present with him at the time he lifted the latch, for the purpose of assisting him to enter, and screened him from observation by opening an umbrella. It

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did incite, move, procure, counsel, hire, and command," the said *Jordan*, *Sullivan*, and *May*, "the felony aforesaid, in manner and form aforesaid, to do and commit," against the statute, &c.

The principal witness against the prisoners was an accomplice named *Huey*; and from his statement it appeared that the prisoners *Jordan* and *Sullivan* accompanied *May*, who was to secrete himself in the office of receiver of fines and forfeitures, that during the night he might commit the robbery; and that the door being latched, they assisted him in gaining admission by opening an umbrella to screen him from observation while he entered; but it appeared that they went away soon after he had got in, and were not seen near the place again until after the robbery had been committed.

*C. Phillips* objected, that assuming *Huey's* statement to be true, there was no evidence to affect *Jordan* and *Sullivan* as principals. He referred to *Rex v. Standerdy* (a). All that appears is, that they put *May* into a situation to commit the felony, but did not assist him in the commission of it; and for aught that appears, *May* may have committed the offence while *Jordan* and *Sullivan* were some miles off.

*Clarkson*, on the same side. I do not say any thing at present about the law as to the breaking and entering, because your lordship would tell me that the jury might find the prisoners guilty of the larceny without the breaking and entering. It cannot be contended on the other side, that these parties are principals in the first degree, for they were not present at the fact; and they are not principals in the second degree, because the facts establish another offence. I do not say that, unanswered,

(a) R. & R. 305.

*Huey's* evidence does not prove abundantly the offence of being accessories before and after the fact. It is not shewn that they were near enough to give assistance at the time; *Rex v. Kelly* (a), *Rex v. Soares* (b), *Rex v. Davis* (c), *Rex v. Else* (d), *Rex v. Badcock* (e). With respect to the breaking and entering, there is no case which shews that even entry by *ingenuity* and *stratagem* amounts to breaking. If the opening of the door had been procured by *fraud*, it might be a breaking, but there is no fraud shewn.

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GASELEE, J.—I will tell you how it strikes me. If the entering by means of the umbrella amounts in law to a breaking and entering, the question will be, whether it is not such an act as makes the persons concerned in it principals in all that was done afterwards, they going there to commit this larceny.

*Campbell*, A. G., for the prosecution.—There was an inner door, that *May* unlatched, which constitutes a breaking. I admit that mere concert will not do; and it is for that reason that we have indicted *Mott* and *Seale* as accessories.

GURNEY, B. (stopping the Attorney-General).—The way in which my brother *Gaselee* put it satisfies me. The parties are actually present at the commencement of the transaction, and it is not necessary that they should be present during the whole commission of the offence.

*Campbell*, A. G., referred his lordship to *Foster's Crown Law*, 352, and *East's P. C.* tit. Burglary, 490.

(a) R. & R. 421.

(b) Ibid. 25.

(c) Ibid. 113.

(d) R. & R. 142.

(e) R. & R. 249; Russ. C. & M. vol. i. 21, 22.

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*Andrews*, Serjt., submitted to the Court that the confirmation of *Huey*, the accomplice, was not sufficient to warrant a conviction.

GURNEY, B.—It is not a matter to be argued. I shall put it to the jury.

*Payne*, who was with *Andrews*, Serjt., asked, if his lordship would allow him to mention some recent decisions as to the kind of confirmation which was required.

GURNEY, B.—I am quite aware of all the cases. You know very well that persons have been convicted on the evidence of an accomplice alone, but I hope it will never be so again. As far as I can, I will take care that it shall not. In this case we are quite of opinion that it is not necessary that the accomplice should be confirmed as to each particular prisoner (*a*).

*Clarkson*. Your lordship takes into consideration the objection as to the breaking?

GURNEY, B.—I do; and we think it is a matter to go to the jury. We have all three considered the objection, and are of opinion that, assuming the evidence to be true, (which is the way to try the question at law,) if *Jordan* and *Sullivan* were present at the commencement, they must be considered as guilty of the whole. There has been a case of burglary where the breaking was one night and the entry the next, and the judges have decided that

(*a*) See as to the confirmation of accomplices, the cases of *Rex v. Moores and Spindle*, 7 Carr. & Payne, 270, and *Rex v. Wilks and Edwards*, *ibid.* 272; as also the case of *Rex v. Hastings and Graves*, *ibid.* 152, and the cases there referred to.

a party who was present at the breaking, and not present at the entering, was guilty of the whole. We consider this a much stronger case than that.

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GURNEY, B., in summing up, after stating the indictment, said—It seems clear that the office of the receiver of fines and forfeitures was entered not by the breaking of any outer doors, or so as to leave any vestige of the breaking of any inner doors, though it seems the chest was broken open. There are two reasons why accomplices are allowed to be called: one is, that without them great crimes might pass undiscovered; and another, the fact that the knowledge that an accomplice may betray him tends to prevent a person from engaging in the commission of a crime. But the interests of innocence require that the evidence of an accomplice should not be acted upon without great caution; and I should advise you not to trust to it, unless it receives such confirmation as to satisfy you that it is true, and that you can trust it as a faithful account. It appears that a person lived on the premises as a servant of the public, and this indictment rightly describes the place where the robbery was committed, as the dwelling-house of our Lord the King, as he occupied it by a servant. With respect to the breaking, the witness *Steele* says that he latched the door, and that a person might get in while he was gone to lock some other place, as his back was then turned to the door, and he says he left no person in. The question for your consideration will be, whether the door was shut, and was opened by the person who committed the felony, whoever it was. If *Steele* left no person in when he went out, and he latched the door, and the person who got in, got in by raising the latch, that is as much a breaking in law as if he had broken through twenty bars of

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iron. His lordship then adverted to the meetings of all the prisoners at the house of *Jordan* and *Sullivan*, in East Lane, and said:—These meetings are of importance, as the confirmation of an accomplice is by the evidence of other witnesses who prove meetings between the parties. *Huey's* meetings with *Mott* or *Seale* would not be so important, as they, being all in the Custom-house, might meet for ordinary purposes; but it is different as to meetings with *Jordan* and *Sullivan*, as they have not given us any account of what business they follow. After some observations on *Huey's* criminality on the one hand, and his evidence of penitence on the other, his lordship said—You will not trust implicitly to his evidence without corroboration. The corroboration which is offered to you to induce you to believe the story he tells, is of different parts: the one to shew that all these parties had together the sort of intercourse, which he describes, of meeting at each other's houses, about the time when the robbery was committed; the other is, the tracing to one of the parties one of the notes stolen. The question is this—Is the evidence of *Huey* so confirmed as to induce you to believe that he has told the truth, with respect to the four prisoners at the bar?

The jury said—We find the guilt of all the prisoners; but as *Seale* and *Mott* have borne a good character, we should wish to recommend them to mercy.



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REX v. HYAMS and others.

THE prisoners were indicted for burglary in the dwelling-house of *Jane Hart*.

It appeared from the evidence of the prosecutrix, that she went out, leaving her window shut down, but not fastened, though she admitted that there was a hasp which could have been fastened to keep it down. The entry was effected by raising the window.

Raising a window which is shut down close, but not fastened, though it has a hasp which might have been fastened, is a breaking of the dwelling house.

For the prisoners, it was objected, that this was not a sufficient evidence of a breaking, as the window was not fastened when it might have been, and that it was similar to that of pushing farther up a window, left a little open, which had been held not to be a breaking.

Mr. Justice PARK and Mr. Justice COLERIDGE were of opinion that there was enough to constitute a breaking; and the prisoners were convicted (*a*).

(*a*) It may be worthy of consideration whether the law of constructive breaking has not been carried somewhat too far. It surely can never have been the intention of the legislature, (for instance); that a little boy

who breaks a pane of glass in a shop window, and takes out a trifling article during the time when the streets are crowded, should be considered as guilty of an offence which is punishable with death.

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## REX v. WILLIAM KINSEY.

A police officer who apprehended a person on a charge of rape, took from him a watch and other articles. The judges of the Court at which he was indicted, on motion supported by affidavit, directed the property to be given up to the prisoner, saying that it ought not to have been taken from him.

THE prisoner was indicted for a rape, and for an assault with intent to commit a rapé.

Previous to the trial, *C. C. Jones*, for the prisoner, applied on affidavit to have a watch and other articles which had been taken from the prisoner by the police officer, at the time of his apprehension, given up to him.

PATTESON, J.—Certainly, the property must be given up; it has nothing whatever to do with the charge. It ought not to have been taken.

GURNEY, B.—It should not have been taken; it must be delivered up to the prisoner himself.

The officer delivered up the watch to the prisoner, and promised to give him the other articles.

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(Michaelmas Term, 1835—continued.)

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The KING v. The JUSTICES of CUMBERLAND.

A Rule nisi had been obtained for a certiorari to remove an order made at a special session, in Cumberland, for the allowance of the accounts of the surveyor of highways for the township of Houghlan. The accounts were produced at a vestry meeting held in the township, and some dispute arising as to an item of the account, it was unanimously resolved, that the surveyor should submit the accounts at once to the justices at the next special session. The surveyor, accordingly, without first laying the accounts before a single magistrate, submitted them to the next special session, at which an order was made for their allowance.

The justices at petty sessions have no original jurisdiction to allow the accounts of waywardens or surveyors of highways.

Nor is such want of jurisdiction cured by the acquiescence of the waywardens and of the vestry.

Sir F. Pollock shewed cause. The justices at special sessions have an original jurisdiction to allow the accounts of surveyors of highways within their division. *Rex v. The Justices of Somersetshire (a)*, which was cited when this rule was moved for, is distinguishable. There the vestry, by a resolution, directed the surveyor to submit his accounts to a particular magistrate, to which he assented; but instead of doing so, he carried his accounts at once before a special session, when they were allowed by the justices. Here, on the contrary, the surveyor was directed by the vestry to lay the accounts at once before the special session, and he acts in obedience to that direction. This objection to the jurisdiction of the justices, at the special session, should have been taken when the case was heard at the special session. It

(a) 6 Dowl. & Ryl. 469; 5 Barnw. & Cressw. 816; 3 Dowl. & Ryl. Mag. Ca. 442.

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cannot now be objected, after the express assent which was given, that the accounts were not laid before one justice previously to their being brought to the special session. If the parties felt themselves aggrieved by what was done at the special sessions, they might have appealed to the quarter sessions. [*Patteson, J.* It has been expressly held in a case in 5 Term Rep. (a), that no appeal lies from the adjudication of the special sessions to the Court of Quarter Sessions. How can the agreement give the justices at the special sessions jurisdiction?] There are many instances in which it has been held that the consent of parties gets rid of the provisions of an act of parliament. The agreement is in the nature of an estoppel (b).

*Cresswell*, contra, was stopped by the Court.

Lord DENMAN, C. J.—The justices at petty sessions have no *original* jurisdiction; and it certainly would be a very safe rule to adopt, that the consent of parties

(a) *Rex v. Justices of W. R. of Yorkshire*, 5 T. R. 629, and *Rex v. Mitchell*, 5 T. R. 701.

(b) Consensus tollit errorem, Co. Litt. 37 a, 126 a, 180 a. But in the cases to which this principle appears to have been applied, the efficacious consent was the consent of all parties whose interests were to be bound. *Vide Bastelhal Castle case*, H. 39 E. 3, fo. 2; *Doane v. Darby*, H. 44 E. 3, fo. 6, pl. 2; *Anon. Dyer*, 367 a; *Baynham's case*, 5 Co. Rep. 36 b; *Dormer's case*, ibid. 40 b; *Fineux v. Hovenden*, Cro. El. 664; *Commins v. Mas-*

*sam*, March, 196, pl. 241; *Blake v. Page*, 1 Keb. 36; *Turner v. Burnaby*, 12 Mod. 564; *Rex v. Clerk*, ibid. 626; Vin. Abr., vol. v., 402, *tit. Consent*; vol. xii. 62, *tit. Evidence* (X a); vol. xiv. 625, *tit. Judgment* (Z), pl. 1; vol. xxi. 120, *tit. Trial* (S a 2); ibid. 554, *tit. View* (C) pl. 32, in marg. Here, on the contrary, by the consent of the special vestry, it was sought to bind not the vestrymen only, but every rate-payer in the parish. And see *Rex v. Gwyer and another*, ante, ii. 448.

cannot confer a jurisdiction which does not legally exist, and that no such estoppel can take place.

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PATTESON, J., WILLIAMS, J., and COLERIDGE, J.,  
concurring.

Rule absolute.

The KING v. The Inhabitants of MILE-END  
OLD TOWN.

ON appeal, an order for the removal of *Ann Cotterall* and her male bastard child from the parish of St. Leonard's, Shoreditch, to the hamlet of Mile-End Old Town, was confirmed, subject to the following case :

*Ann Cotterall*, aged eighteen years, who has never done any act to gain a settlement in her own right, was born in wedlock, in Mile-End Old Town, of Irish parents, who have not gained any settlement in England. On 20th August, 1834, she was delivered of a male bastard child in St. Leonard's, Shoreditch, in the house of her father, with whom she continued to reside as part of his family, occasionally going out charing; and on 21st August, 1834, application was made by her mother to the overseers of St. Leonard's, Shoreditch, for relief

The English-born and unemancipated daughter of Irish parents, residing in England, but not having done any act to gain a settlement, cannot, upon becoming actually chargeable, be removed to the place of her birth.

But in such case, the parents, together with all such of their children as have not acquired a settlement in their own right, may be passed to Ireland, under 3 & 4 Will. 4, c. 40.

Relief given to a child of Irish parents, above sixteen years of age, but residing with his father's family, renders the father actually chargeable within the meaning of 3 & 4 Will. 4, c. 40; notwithstanding sect. 56 of the Poor Law Amendment Act, 4 & 5 Will. 4, c. 76, which was held not to apply to Irish and Scotch paupers.

Whether relief to a child of *English* parents, above sixteen, but residing with his father, given since the passing of the Poor Law Amendment Act, renders the father chargeable, *quære*.

Where the daughter of an Irish pauper is removed with her father to Ireland, under 3 & 4 Will. 4, c. 40, her bastard child, born in England, cannot be removed with her, although within the age of nurture.

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for *Ann Cotterall* and her bastard child only; upon which the order appealed against was made.

The question for the decision of the Court is, whether, reference being had to the provisions of 3 & 4 *Will.* 4, c. 40, s. 2, and 4 & 5 *Will.* 4, c. 76, ss. 56 and 71, the pauper and her bastard child were settled in Mile-End Old Town.

*Prendergast*, in support of the order of sessions. By sect. 2 of 3 & 4 *Will.* 4, c. 40, two justices, upon the complaint of the churchwardens or overseers of any parish that any person born in Ireland or Scotland, &c. has "become chargeable to such parish by himself or herself, or his or her family," may cause such person to be brought before them, and examine him touching the place of his birth or of his last legal settlement; and if it shall be found that he was born in any of the aforesaid places, and has not gained any settlement in England, and that he has become actually chargeable to the complaining parish "by himself or herself, or his or her family," then such justices shall, by an order of removal, cause such poor person, his wife, and such of his or her children so chargeable as shall not have gained a settlement in England, to be removed to his birth-place. The language of this enactment is precisely the same as that of 59 *Geo.* 3, c. 12, s. 33, upon which *Rex v. Whitehaven* (a) was decided. In that case the pauper, an unmarried and unemancipated daughter of Irish parents, being pregnant, was removed from Whitehaven, where she resided with her parents, to Workington, as the place of her birth. The pauper's parents had not gained any settlement in England. The father had not applied for any relief for himself or any of his family. It was

(a) 5 Barn. & Ald. 720; 1 Dowl. & Ryl. 384; 1 Dowl. & Ryl. Mag. Cn. 97.

held, that the pauper was properly removed to Workington, for that the chargeability contemplated was the actually asking for relief, and not the mere constructive chargeability by means of the pregnancy of the unmarried daughter. That case decides that the child of Irish parents, not settled in England, is legally settled in the parish in which it is born, and upon becoming individually chargeable, is removable to such parish, although unemancipated. *Ann Cotterall* was therefore legally settled in Mile-End Old Town. This case is much stronger than *Rex v. Whitehaven*, by reason of the changes introduced by the Poor Law Amendment Act (a). Before that statute, relief to any unemancipated member of a man's family was considered as relief given to the man himself. By sect. 56 of 4 & 5 Will. 4, c. 76, it is enacted, "that all relief given to or on account of the wife, or to or on account of any child *under the age of sixteen*, not being blind, deaf, or dumb, shall be considered as given to the husband of such wife, or to the father of such child, as the case may be; and any relief given to or on account of any child, *under the age of sixteen*, of any widow, shall be considered as given to such widow: provided always, that nothing therein contained shall *discharge* the father and grandfather, mother and grandmother, of any poor child, from their liability to relieve and maintain such poor child in pursuance of the provisions of 43 *Eliz.* c. 2,"—i. e. from liability to support a child no longer a member of the family. The legislature clearly contemplated that thenceforth relief given to a child *above* the age of sixteen, should not be considered as given to the father or widowed mother of such child. This is shewn not only by the enactment of that section, but also by the *proviso*,

(a) 4 & 5 Will. 4, c. 76.

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sixteen, or until the death of their mother." T  
lature, by the enactment in sect. 56, intended  
the attainment of the age of sixteen tantam  
emancipation, for the purposes of relief and of  
of the father. If this argument be correct, the  
parents could not have been passed to Ireland  
unless her parents were removable, the pau  
clearly not liable to be passed to Ireland. In  
*Bennett and Broughton* (a) it was held, that u  
*Geo. 3, c. 12, s. 33*, an Irish female pauper, l  
bastard child born in a parish in England, an  
the age of nurture, may, on becoming charge  
passed to Ireland, though the child cannot be s  
her; the act not authorizing the removal of an  
person. Birth in wedlock confers a settlement,  
be no settlement in the parents. In *Rex v. Gre*  
*ton* (b) the case was:—An Irish man, and a  
woman, his wife, not having gained a settlement,  
in Great Clacton, and had a child born there.  
afterwards removed to St. Margaret's, Ipswich  
the husband died, and the woman afterwards a

cording to 59 *Geo. 3*, c. 12, s. 33. But the Court held that the statute applied only to persons *born* in Ireland; that without determining what would have been the case if the mother had been also chargeable, and had not acquired a settlement, yet as she could not then be removed by pass to Ireland, he must be regarded as if he had *no* parent alive; and that if so, he was clearly not within the purview of the statute. The act of 3 & 4 *Will. 4*, c. 40, is very restrictive upon the liberty of Irish and Scotch subjects, and should therefore be construed with great strictness.

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*Thesiger*, contra. I. What was the law upon this subject, before the passing of 4 & 5 *Will. 4*, c. 76?

Under 59 *Geo. 3*, c. 12, s. 33, or 3 & 4 *Will. 4*, c. 40, s. 2, the legitimate child of Irish parents, born in England, is not settled in the parish of its birth, so as not to be liable to be passed to Ireland with its parents. In *Rex v. Leeds* (a) it was held, that by 59 *Geo. 3*, c. 12, s. 33, the wife and unemancipated children of a Scotchman, who has not acquired any settlement in England, must, if chargeable, be sent by a pass with the husband to Scotland, and cannot be removed to the maiden settlement of the wife. One of the arguments in that case was, that the children had settlements by birth in England, and that therefore they, at all events, could not be removed: and *Holroyd, J.*, says, "It seems to me that it is altogether immaterial, provided the head of the family be born in Scotland, whether the children be born in England or not. The only exception is as to those children who have gained settlements in England in their own right" (b). In *Rex v. Whitehaven* the only

(a) 4 Barn. & Ald. 498.

(b) In *Rex v. Leeds*, the spe-

cial case did not state that the children were born in England,

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point considered was, whether a *constructive* chargeability, by reason of the pregnancy of the unmarried daughter of Irish parents, was such a chargeability as was contemplated by the act; and it was held that an *actual* chargeability was intended. Then, was there such a chargeability in this case as made the pauper's father liable to be passed to Ireland? The words of the statute are, "become actually chargeable by himself or herself, or his or her family." Relief, therefore, administered to a subordinate member of the family, will authorize a removal of the whole family. Relief to a child, part of the father's *family*, of whatever age, is relief to the father. In this case the pauper was, to all intents and purposes, a part of her father's family.

The Poor Law Amendment Act does not apply to this case. There is nothing in that act to shew that it was intended that Irish and Scotch poor should be within the purview and operation of it. It is entitled "An Act for the amendment and better administration of the laws relating to the Poor in *England and Wales*" (a), and Irish and Scotch poor are not mentioned in it; nor are the enactments in general in their nature applicable to the case of Irish and Scotch poor.

The pauper's bastard child is settled in the parish of St. Leonard's, Shoreditch, by reason of its birth, and

and did expressly state that they had not gained any settlement in their own right. And "it was only decided in that case that where the husband (who was born in Scotland) and his wife were living together, the wife must be sent along with him to Scotland." Per *Bayley, J.*, in *Rex v. Cottingham*, 7 Barn. & Cressw. 647. The dictum of

*Holroyd, J.*, cited in the argument, appears therefore to be extra-judicial.

(a) The title is no part of an act of parliament: *Powder's* case, 11 Co. Rep. 33 b; *Attorney-Gen. v. Hutchinson*, Hardr. 324; *Chance v. Adams*, 1 Lord Raym. 77, 78; *Mills v. Wilkins*, 6 Mod. 62, 2 Salk. 609; *Rex v. Williams*, 1 W. Bla. 95.

cannot be passed to Ireland with the rest of the family.  
*Rex v. Bennett and Broughton (a).*

*Cur. adv. vult.*

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On a subsequent day in this term, the judgment of the Court was delivered by PATTESON, J. (b), as follows :

The question in this case is, whether the removal of the pauper, with her infant bastard child, to the appellant hamlet, can be sustained ; and that depends upon this further (and principal) question, whether she ought not to have been removed with her father to Ireland, under the provisions of 3 & 4 Will. 4, c. 40, s. 2.

The case states that the pauper was born in the appellant hamlet, of Irish parents, who have gained no settlement in England. They, therefore, are directly within the section of the statute above referred to, if, at the time of this order made, the father had become chargeable to the parish of St. Leonard's, Shoreditch,—provided the effect of it has not been altered by the subsequent statute of 4 & 5 Will. 4, c. 76. And it seems to us that the pauper's father was so chargeable at the time in question. The language of the 2d section of the first-mentioned act, with reference to this subject, is, "hath become chargeable by himself or herself, or his or her family." Now the pauper was, at the time of her removal, living with her father as a part of his family, having done no act, nor having contracted any relations, inconsistent with that character. Relief therefore to the pauper under her father's roof, in the manner stated in the case, did render the father removable to Ireland, and as a consequence the daughter also.

It is now to be considered how far the former act is

(a) *Suprà*, 454.

(b) Lord Denman, C.J., having been absent at the time of the

argument on account of indisposition.

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affected by the 4 & 5 *Will.* 4, c. 76. And it is at once observable that the object of the two statutes is perfectly distinct. The former is confined merely to making provisions for the removal of certain persons born in Ireland, Scotland, &c. who have gained no settlements in this country. No question, affecting the removal or settlement of persons born in *England* is touched or attended to; whereas the objects and provisions of the latter statute are purely and exclusively *English*. Various and important alterations are made in the laws respecting the gaining of settlements, the duty of overseers, and the management of the poor; all of which are of necessity applicable and confined to England. It is observable also, that the title of the act itself purports to concern England and Wales, and them only; nor do we perceive any regulation which has the slightest relation to Ireland, Scotland, &c.—the places enumerated in the first-mentioned statute. We think therefore that the sound construction and interpretation of the two statutes is to hold them to be in effect and operation, as they are in object, wholly separate and distinct. This being so, we are of opinion that the provision in the 56th section of 4 & 5 *Will.* 4, c. 76, as to the age up to which the parent is to be deemed answerable for relief given to a child, viz. sixteen, (whatever might have been its effect upon relief given to a child above that age, as to the chargeability of the parent, if the parties had been English,—on which we give no opinion,) does not apply to the present case, depending, as it has been already stated it does, on the 3 & 4 *Will.* 4, c. 40, s. 2.

We think therefore that the character of the daughter's residence with the father, and his liability to maintain her and to be considered chargeable by relief given to her, are to be considered as they would have been if the latter act had not passed.

It is true that in *Rex v. Whitehaven* (a) the sessions had quashed an order of justices removing an Irish woman, pregnant, and living with her parents unemancipated, to her birth settlement, upon the ground (as stated in the case) that she ought to have been sent with her parents by a pass to Ireland, under the 59 *Geo. 3*, c. 12, (which has the same expressions as to the chargeability of the father as the 3 & 4 *Will. 4*, c. 40, viz. "became chargeable by himself or his family:") and this Court quashed the order of sessions, upon, as it seems, but little discussion, and with not very much consideration. Upon that case two things are to be observed; first, that the question how far the woman, circumstanced as she was, could gain a settlement by birth, was not noticed at all; whereas, in the case of *Rex v. Leeds* (b), that question was considered, and it was held, that birth in such case gave no settlement,—next, that the decision proceeds expressly upon the ground that under the 59th *Geo. 3*, the chargeability contemplated by the statute was the actual asking for relief, and not the constructive chargeability (by pregnancy) under the 35th *Geo. 3*, c. 101; upon which it may be sufficient to observe, that the defect upon which the Court held the decision of the sessions wrong, does not exist here. Relief in this case was actually asked for and given before the order of removal was made.

It remains to be added, that according to the authority of *Rex v. Bennett and Broughton* (c), the bastard in this case cannot be removed with the mother to Ireland. This, however, is a circumstance not necessary for our decision, which is, that the removal of the pauper, which should have been to Ireland, having been

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456. And see *Rex v. St. Mary*,  
*Leicester*, *ante*, 241.

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made to the appellant hamlet, is wrong; and therefore the order of removal, and the order of confirming the same, must be quashed.

Order of Sessions quashed

(a) *Vide* observations upon Practical Treatise on this decision and as to its probable consequences, in Leigh's Laws, 672, n.

—◆—  
REX v. SILLIFANT, Esq.

*Semble*, that justices have in no case jurisdiction, under 53 *Geo.* 3, c. 127, s. 7, to make an order for the payment of an assessment to a church-rate, the validity of which has at any time been questioned in the Ecclesiastical Court,—although such court had also decided in favour of the rate.

Where magistrates are called upon, under 53 *Geo.* 3, c. 127, to enforce a church-rate,

good upon the face of it, it is no ground of objection before them, that was in fact made for the *reimbursement* of the churchwardens.

The Court will not call upon justices to make an order for the payment of church-rate, when there is any doubt whether the justices have jurisdiction to make such order.

APRIL 3, 1835. The churchwardens of St Teignhead, Devon, in pursuance of a resolution of the parishioners, in vestry assembled, made a church-rate of 34*l.* 5*s.* 6*d.*, which, on the face of it, purported “for the repairs of the church of the said parish, and for such other purposes as a church-rate is by law appointed to be levied for the present year,” but which was in fact made principally for the purpose of reimbursing the churchwarden for moneys expended by him as such, during the previous year. One *George Nichols*, an inhabitant of lands, being assessed in such rate, at the rate of 4*l.* 10*s.* 4*d.*, appeared before the Consistorial Court of the Bishop of Exeter, and made objection to it, that the glebe lands were not rated. This objection was however over-ruled, and the rate was confirmed in due form on 23d May. *Nichols* having refused to pay to the churchwarden the rate of 4*l.* 10*s.* 4*d.* upon demand made, the churchwarden obtained a sur

under 53 *Geo. 3*, c. 127, s. 7, convening *Nichols* before the magistrates to be assembled at Teignmouth, on 8th June following. On that day *Nichols* attended at Teignmouth, before Mr. *Sillifant* and another, magistrates of the county of Devon, and after the churchwarden had sworn to a demand and refusal of the rate, objected to the validity of the rate on the ground of the omission to rate the glebe lands, and therefore disputed his liability to pay the amount in which he was rated. A further objection was taken by Mr. *Sillifant*, that the rate was made in order to *reimburse* the churchwarden for money previously expended by him as churchwarden, whereas by law a rate could not be made for such purposes. The magistrates upon this dismissed the summons, and refused to make any order for the payment of the rate. Upon an affidavit of the churchwarden, stating these facts, Sir *W. W. Follett*, in Trinity term, obtained a rule, calling upon Mr. *Sillifant* to shew cause why a mandamus should not issue, commanding him to make an order for the payment by *Nichols* of the assessment of 4*l.* 10*s.* 4*d.*

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*Crowder* now shewed cause. The validity of this rate has been questioned in an ecclesiastical court, and therefore the justices could not, under 53 *Geo. 3*, c. 127, s. 7, issue a warrant to levy the sum in which *Nichols* was assessed. The act gives jurisdiction to the justices in respect only of rates, "the validity whereof has not been questioned in any ecclesiastical court." There does not appear to have been any express decision upon this part of the enactment, but the decisions in *Rex v. Milnrow* (a) and *Rex v. Wrottesley* (b), upon the *proviso* in the same clause, throw light upon this point. The *proviso* is, "that if the validity of the rate, or the liability of the

First and second points:  
 Absence of jurisdiction, because rate disputed before magistrates and in ecclesiastical court.

(a) 5 Maule & Selw. 248.

(b) 1 Barn. & Adol. 648.

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person from whom it is demanded, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereon." And it was held, in *Rex v. Milarow*, that the justices cannot proceed against a party who says to them, bonâ fide, that he disputes the validity of the rate, even though at the same time he gives a reason of very doubtful sufficiency, but grounded upon a matter which might be litigated in the ecclesiastical court. *Rex v. Wrottesley* supports that decision. Here, not only had the validity of the rate been disputed in the ecclesiastical court, but it was again disputed before the magistrates.

Third point:  
 Rate for reimbursement of churchwardens.

The rate is illegal upon the ground taken by the magistrates, and therefore they cannot be called upon to issue a warrant to enforce it. A rate cannot legally be made for the purpose of reimbursing churchwardens for money expended by them in their office; *Towney's case* (a), *Dawson v. Wilkinson* (b), *Rex v. Chapelwardens of Haworth* (c), *Lanchester v. Thompson* (d).

Fourth point:  
 Justices not compellable to act in doubtful cases.

This Court will not issue a mandamus to compel magistrates to issue a distress-warrant (e) to enforce the payment of rates, where it is doubtful whether the warrant would be legal, and the rates are recoverable by

(a) 2 Lord Raym. 1009.

(b) Ca. temp. Hardw. 381.

(c) 12 East, 556.

(d) 5 Maddock, 4; *coram Leach*, V. Ch.

(e) In a doubtful case, justices will not be required to do an act which may render them liable to an action—as the granting of a distress-warrant; *Rex v. Justices of Bucks*, 2 Dowl. & Ryl. 689, 1 Barn. & Cressw. 485; 1 Dowl. & Ryl. Mag. Ca. 369; *Rex v. Justices of Bucks*, ante, ii. 37. Here, though no action would

have lain against the justices for doing the act which the mandamus would have required, yet the making of the order for the payment of the rate would have placed them in this predicament, that, in case of disobedience, they must either have seen their authority disregarded with impunity, or have taken the next step,—that of issuing a distress-warrant, which would have brought them within the peril of an action.

another mode of proceeding; *Rex v. Hall and Dyer* (a). Here, there is at all events *doubt*, whether an order issued under the circumstances would be legal, and the churchwardens have a remedy by proceeding in the ecclesiastical court.

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This rule is for a mandamus to *one* magistrate, commanding him to make an order, which the statutes require should be made by *two* justices. This is a clear ground for dismissing the application.

Fifth point:  
Application  
against one  
justice only.

Sir *W. W. Follett*, *contra*. If the party had, upon attending before the justices in pursuance of the summons, said that he had a *bonâ fide* objection to make to the rate, and that he meant to appeal to the ecclesiastical court, Mr. *Sillifant* would have been justified in refusing to make an order. Here, however, the only objection the party takes is, that the glebe lands were not included in the rate, and this objection *had already* been made by him in the ecclesiastical court, and that court had *decided against it*.

First point.

The next objection is, that this is a rate the validity of which *has been* questioned in the ecclesiastical court, and that therefore the justices have no jurisdiction. As the validity of the rate has not only been questioned but also decided in that court, this case is precisely that in which the magistrates ought most especially to interfere. [*Coleridge, J.* Is that clear? The words of the act are, "if any one duly rated to a church-rate or chapel-rate, the validity whereof *has not been* questioned in any ecclesiastical court, shall refuse," and so on.] If the magistrates have no jurisdiction in a case such as this, then there is no mode of raising the rate, for it would appear from the second proviso in the 7th section of 53 *Geo. 3*, c. 127, that the ecclesiastical court has no power

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to enforce the payment of any rate, unless the amount due from the party proceeded against exceeds 10*l*. The words of the act must be understood to refer to some proceeding *pending* in the ecclesiastical court.

Third point.

The objection to the rate on the ground of its being retrospective was not properly raised, as the rate was upon the face of it good. In *Rex v. Haworth (a)* the objection arose upon the face of the rate, and *Dawson v. Wilkinson (a)* and *Lanchester v. Thompson (a)* were cases of applications made for the purpose of compelling the making of a rate to reimburse churchwardens. Those cases are therefore not applicable here. Moreover, this objection ought not to have been taken by the magistrate. The *party* opposing the rate made no objection on this ground, but contented himself with taking another objection, which had already been over-ruled in the ecclesiastical court. But supposing the question to be properly raised, there appears to be no ground whatever for holding a rate made, as in this case, by churchwardens, in pursuance of a resolution of the inhabitants in vestry assembled, for the amount of disbursements made by such churchwardens, during the current year, to be illegal.

Fifth point.

It does not appear that the other magistrate refused to make the order, (which *Crowder* denied).

First and  
second points.

Fourth point.

Lord DENMAN, C. J.—This act is not easily to be understood. It appears, however, that in this case one of the circumstances which ground the jurisdiction of the justices is wanting, because the validity of the rate had been questioned in the ecclesiastical court. Besides, the party stated his objection before the justices. It is very doubtful whether this is not exactly within the description of cases to which the jurisdiction of the

(a) *Suprà*, 436.

ustices does not apply, and therefore they could not be  
alled upon to issue a warrant.

The last objection is well founded. Two magistrates  
are required to act.

The rule must be discharged with costs.

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Fifth point.

PATTESON, J.—I was at first much struck with the words “the validity whereof has not been questioned in any ecclesiastical court.” At first I thought it must mean to relate to a rate the validity of which is not at *present* under discussion; but I now think that it means, the validity whereof *has* not been questioned. Second point.

COLERIDGE, J.—It is enough to say that it is a matter of *doubt* on these words, whether the magistrates had authority to proceed to enforce this rate. There is no rule more correctly adhered to, than that magistrates shall not be exposed to actions the event of which may be doubtful. Fourth point.

Lord DENMAN; C. J.—I believe we are quite satisfied that it is no valid ground of objection that the rate is retrospective, as it is good upon the face of it. Third point.

Rule discharged with costs.



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## The KING v. The Marchioness of DOWNSHIRE.

A public foot-way leading from A. to the gate of a church-yard, and communicating through that gate, by a public path through the church-yard, with the church, may be described in an indictment as a foot-way leading from A. towards and unto the church.

So, although part of the path across the church-yard is ancient and part has been recently dedicated to the public.

So, although the path, instead of leading directly from the gate to the church, forms an acute angle in one part of it.

**INDICTMENT** found at the Worcester quarter sessions, and removed by certiorari, for stopping up a common and public footpath in the parish of Ombersley, "leading from the turnpike road from the said parish of Ombersley, to the parish of Holt, in the said county, *towards and unto the parish church* of the parish of Ombersley." Plea: not guilty.

At the trial, before *Williams, J.*, at the Worcestershire Summer assizes, 1834, it appeared that there had been a footpath leading from the turnpike road to the church-yard,—that a gate led from the path into the church-yard,—that from the gate a gravel path had formerly led almost in a direct line to the old parish church, but that a new church having only a few years before been erected in a different part of the church-yard, a new gravel path, leading out of and continuing the old gravel path, but forming an acute angle with it, was made to the door of the new church. The defendant had stopped up that portion of the footway which led from the turnpike road to the church-yard.

It was contended by the defendant's counsel that the road indicted was improperly described as leading "towards and unto the parish church of the parish of Ombersley." The learned judge was, however, of opinion that the road was properly described, and directed the jury to find a verdict of *guilty*, but gave the defendant leave to move to enter a verdict of *not guilty* upon the objection. The jury having found a verdict of guilty, *Jervis*, in the following term, obtained a rule nisi to set that verdict aside, and to enter a verdict of not guilty.

*Talfourd, Serjt., Godson, and W. J. Alexander*, shewed cause. This path is properly described as a road "towards and unto the parish church," for such, to all intents and purposes, it is. Supposing the path to end at the gate leading into the *church-yard*, (which may be regarded as the garden or curtilage of the church,) there would be a sufficient compliance with the rule, that the termini of an indicted road, if stated at all, shall be correctly described. The object of that rule is, that the defendant may not be misled by an inaccurate description, and it seems impossible that the defendant could be misled by a description of a road leading to the church-yard, as a road leading "*towards* and unto the church." But in fact the path was continued "unto" the church, and it is no answer, that in a particular part of the path it takes a turn, forming an acute angle with the preceding part of it. In either view of the case the description is sufficient. In *Simpson v. Lewthwaite* (a), where, to trespass for breaking and entering the plaintiff's closes, the defendant pleaded that he was seised in fee of land *next adjoining to one of the said closes* in which &c., and then claimed in respect of the *said* land, a way *from the said land unto, into, through, over, and along the said closes* in which &c., and unto and into a certain common king's highway; and at the trial the defendant proved a prescriptive right of way from his land into and over the land of *third* persons, and *thence* into and over the plaintiff's closes, and thence into a common highway, it was held that the plea was sufficiently proved; and this, though it appeared that part of the defendant's land did adjoin one of the plaintiff's closes, and that by permission of the latter the defendant had sometimes used a way from that part of his land over the plaintiff's adjoining close, as well as the way to which the plea was meant to

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(a) 3 Barnw. & Adol. 226.

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refer. [*Patteson, J., Rex v. Great Canfield* (a) was relied on upon the motion.] In that case the road, for the non-repair of a portion of which the defendants were indicted, was described as leading from *Great Dunmow* to the village of *Little Canfield*, and from thence to the village of *High Roothings*. It appeared that there was a direct road from *Dunmow* to *Little Canfield*, but the road which led to *High Roothings* (and which was the road indicted) turned off from the road leading from *Dunmow* to *Little Canfield*, a quarter of a mile short of *Little Canfield*, so that to follow the road as laid in the indictment, a person must, in going to *Little Canfield*, pass by the road leading to *High Roothings*, and having gone to *Little Canfield*, return a quarter of a mile back again to get into the road indicted. Lord *Ellenborough* there held, that as the description given to the road imported that there was a *direct* communication from *Great Dunmow* to *High Roothings*, through *Little Canfield*, there was a fatal variance. That description could not, indeed, without a most violent construction, have been held sufficient. The present case bears no resemblance to that. In *Rouse v. Bardin* (b) it was held, that in trespass, a plea of justification, stating that a public highway led from another highway (leading from A. to B.) in, through, over, and along the *locus in quo*, to a certain other highway (leading from C. to D.) was well supported by evidence proving that the way in question led from the *terminus a quo* (viz. the way leading from A. to B.) over the *locus in quo*, to a different way called E., and along that way into the way leading from C. to D. (the *terminus ad quem*.) In that case Lord *Loughborough* differed from the other judges; but the decision was recognized in *Simpson v. Lewthwaite*. In *Allen v. Ormond* (c) it was

(a) 6 Esp. N. P. C. 136.

(c) 8 East, 4.

(b) 1 H. Bl. 351.

held, that the *terminus ad quem* being laid to be a public highway, is proved by evidence of a public footway, though such description of the terminus might have been bad on *special demurrer*, as not being sufficiently certain. In *Clerke v. Cheney* (a), which was trespass for breaking the plaintiff's close, the defendant justified by reason of a way from his house through the *locus in quo usque altam viam in parochiâ D. vocat. London Road*, and issue was joined upon the way, and found for the plaintiff. It was moved in arrest of judgment, that there was no issue joined, for the uncertainty of the *terminus ad quem*. "*Sed non allocatur*, for in regard it is found that he had a way over the place where, it is not material to the justification whither it leads, it being after verdict when the right of the case is tried." The defendants will probably rely upon *Rex v. Great Canfield* and *Wright v. Rattray* (b). The former case has already been distinguished; and the latter case cannot apply, for that was a claim of a prescriptive way which was merely described as leading over the defendant's close "*unto*" D. (the *terminus ad quem*); and the Court doubted whether, if the claim had been for a prescriptive right of way over the defendant's close *towards* D., it might not have been sufficient. Here the road is described as leading "*towards and unto*," which cannot mean the same thing as "*unto*" alone.

*Jervis, Whateley, and Tulbot* contra. It is not necessary, in an indictment for obstructing a public highway, to state any *termini*, but if they be set out, they must be described with accuracy. It is said to be sufficient that this path leads to the church-yard, but there is no difference in law between a church-yard and any other close which might have intervened between the path and

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(a) 1 Ventris, 13.

(b) 1 East, 377.

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the church. The gate at the church-yard should have been assigned as the *terminus ad quem*. The obstruction was no doubt shewn to be between the turnpike road and the church-yard gate; but under the loose, uncertain description in this indictment, it was equally competent to the prosecutor to prove an obstruction between the church-yard gate and the church door. The prosecutor has treated the whole path from the turnpike road to the church door as identical, whereas it is composed of distinct parts, running in different directions, and of which one was an ancient path, and the other a path but very lately dedicated to the public. *Rouse v. Bardin*, *Jackman v. Shillito* (a), and *Simpson v. Lewthwaite*, when duly considered, appear only to establish this,—that when the *termini* of a way are set out, all the intervening closes need not be stated; a principle which does not apply to the present case. *Wright v. Rattray*, on the other hand, seems directly applicable. In that case it was held, that a claim of a prescriptive right of way from A. over the defendant's close unto D., is not supported by proof of a prescriptive right of way from A. over the defendant's close to D.,—it appearing that a close called C., intermediate between the defendant's close and D. was formerly possessed by the owner of A., and by him sold to a third party, without any reservation of the right of way. In the argument in that case the following language of *Dodderidge, J.*, in *Sloman v. West* (b), is quoted: "If a man have a right of way from his house to the church, and the close next to his house, over which the way leads, is his own, he cannot prescribe that he has a right of way from his house to the church, because he cannot prescribe for a right of way over his own land." And this position is referred to with approbation

(a) Cited in *Wright v. Rattray*, (b) Palm. 387; 2 Roll. R. 397. 1 East, 381.

by Lord *Kenyon*, C. J., in his judgment. The case put is the converse of this case, in which, according to one of the prosecutor's arguments, a right of way from the turnpike road to the church-yard gate is claimed as a right of way to the church. If the description be considered to be of a path leading up to the church, it is improperly described as one entire path. In this view *Rex v. Great Canfield* seems precisely to resemble this case. Here, as there, a person going along the alleged way has, upon passing the point of junction between the old gravel path in the church-yard and the new, in some degree to return in the direction whence he came. The new path forming, as it does, an acute angle with the old gravel path, cannot be treated as part of the same path. Considerable stress has been laid in the argument contra, on the use of the word "towards," but in fact the use of that expression, coupled with the use of the word "unto," strengthens the argument for the defendant. In *Lempriere v. Humphrey* (a), which was an action of *quare clausum fregit*, the description of the *locus in quo*, as abutting "towards" other closes, was recognized as being a sufficiently certain description, if not objected to upon special demurrer, or made the subject of an application for a judge's order for a more certain description of the close. "Towards" and "unto" must therefore be recognized as having different meanings; and as the prosecutor here introduces both, he must be taken to mean to give evidence in support of each.

Lord DENMAN, C. J.—It appears to me that there was no misdescription in this case. The way is described as a certain common and public footpath, leading from the Ombersley and Holt turnpike road "towards and

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(a) 4 Nev. &amp; Mann. 638.

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unto the parish church of the parish of Ombersley." It appears that there was a public footpath (which is the path obstructed) from the turnpike road to the gate of the church-yard, and that from such gate there ran a gravel path leading through the church-yard to the new church, which had lately been erected. It is true that at a certain point in this path an acute angle is found, but that cannot make it the less a path to the church. *Re v. Great Canfield* is the only case which appears to give any foundation to the arguments for the defendant, and that case is essentially different from the present. There, a road leading from A. to B. was improperly described as a road leading from A. to C., and from thence to B.; it appearing that C. lay out of the direct road, and that a portion of the way to it, from either A. or B., was by one and the same short road leading out of the high road from A. to B., so that, in order to get from A. to C., and from thence to B., a quarter of a mile of road must be both passed and repassed. Here, there is no occasion to pass any part of the path twice.

It makes no difference, as regards the present question, that a part of the path is new and the remainder ancient. If the whole path had been described as an *immemorial* path, the description would have been false; but that not being so, no difficulty can arise from one part being public by ancient user, and the other by modern dedication.

PATTESON, J.—I am also of opinion that there is no misdescription in this case. At first I was struck with the argument, that the part of the gravel path up to the point where it makes the turn is old, and the remainder is modern; but it now seems to me quite immaterial at what particular time each part was dedicated to the public, as it is merely described as "a certain common

and public footpath." This case is very different from *Rex v. Great Canfield*. The path in this case makes an angle backwards, but you do not go over any part of it twice.

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COLERIDGE, J.—I also am of the same opinion. If this path had been laid as an ancient immemorial common or public footpath, I should have felt the difficulty of one of the arguments pressed upon us. But that is not so.

If this be a public highway for the inhabitants of the part of the parish from which it leads to the parish church, although by a circuitous course, it is sufficiently described as leading "towards and unto the parish church."

WILLIAMS, J.—I think that the evidence fully sustained the allegation. The objection seemed to me to come to this, that the allegation, that the path led "towards and unto the parish church," could only be sustained by shewing a path leading in an almost direct line up to the church. The fact of there being an acute angle in the path, does not make it the less a path leading "towards and unto the parish church." No part of the same line is to be retraced.

Rule discharged.

END OF MICHAELMAS TERM.

## HILARY TERM,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

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REX v. The Inhabitants of ST. GILES IN THE FIELDS.

A settlement may be gained under 1 W. 4, c. 18, by a party hiring a house and residing in it for a year, notwithstanding that he is in the habit of taking in persons to sleep in some of the rooms,—sometimes letting a bed and sometimes half a bed,—generally by the night only, but occasionally by the week,—such persons having no right to the rooms during the day, and he retaining the keys of all the rooms and having constant access to and control over the whole house.

UPON appeal against an order for the removal of *Thomas Barron*, his wife and children, from the parish of St. Giles in the Fields to the parish of St. Mary-le-bone, the sessions quashed the order, subject to the following case:

In 1831, the pauper became the tenant of a house in the appellant parish, at the yearly rent of 24*l*. He held the house for three years, paid the rent, and complied with all the requisites of 6 Geo. 4, c. 57, and 1 Will. 4, c. 18, if under the following circumstances he was sufficiently in the *actual occupation* of the house.

The pauper resided in the house with his family. The furniture in all the rooms was his, and he was in the habit of taking in labouring people to sleep in some of the rooms,—sometimes letting a bed, sometimes half a bed; the letting being generally by the night, but in some rare instances a bed having been let for the period of a week. The persons who thus slept in the house had no right to the rooms during the day, the pauper and his family having constant access to and control over the whole of the house, and the pauper always retaining the keys of all the rooms in his own possession. In the instances of letting for a week, the pauper let the bed only, reserving to himself the right of putting ano-

ed in the same room at any time, if he thought

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question is, whether the pauper actually occupied the house within the meaning of the above-mentioned statute. If the occupation was sufficient, the sessions to be quashed; otherwise to stand.

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*plus*, in support of the order of sessions. There is not such an occupation as the act of 1 Will. 4, requires. There must now be an *actual* occupation and such occupation must be uninterrupted and independent of any other person; *Rex v. St. Nicholas, per (a)*, and *Rex v. St. Nicholas, Colchester (b)*. In those sessions, a distinction was attempted to be taken between those cases and the present, on the ground that in those cases a *bed* only was let; but such a letting created an occupation incompatible with the landlord's occupation of the whole of the house. Even assuming, as was done at the sessions, that the landlord might, after the sessions, have set up a bed for the lodger in any room that he pleased, still he cannot be said to have had the actual occupation of the whole of the house. It was also held at the sessions, that inn-keepers and hotel-keepers are in the same situation as the pauper in the case, and that the occupation of inn-keepers &c. is sufficient within the meaning of the statute. As to *inn-keepers* the answer is, that the law imposes upon them the *duty* of admitting guests and soldiers billeted upon them. No doubt *hotel-keepers* are in the same situation as any other keepers of houses. The rule laid down by the Court in *St. Nicholas, Rochester*, and *Rex v. St. Nicholas*,

*Nev. & Mann. 21; 5 (b) 3 Nev. & Mann. 113; 2 Adol. 219; 2 Nev. & Adol. & Ell. 599; 2 Nev. & Mag. Ca. 1. Mann. Mag. Ca. 104.*

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*Colchester*, is broad and clear, and to introduce an exception would be to destroy that uniformity which is most desirable in this branch of the law. The rule is, that the landlord must have the *exclusive* occupation of the house; and if a party can be said to be in the exclusive occupation of his house where he parts with a dominion over a portion for one night, there is no reason for saying that he is not equally in the exclusive occupation where he lets a part for a month.

*J. L. Adolphus*, (with whom was *W. Clarkson*,) was stopped by the Court.

LORD DENMAN, C. J.—We are clearly of opinion that there was an actual occupation by the pauper. The case of inn-keepers is almost similar to the present. Here the party kept the control over the whole of the house, and was there all the time. The permitting persons to sleep in the rooms did not prevent him from being in the actual occupation of the house.

LITLEDALE, J.—The pauper had constant access to and control over the whole of the house, and the letting was merely of a bed for the night. He had therefore the exclusive occupation of the whole of the house.

WILLIAMS, J.—I am of the same opinion. The statement of the case in truth puts an end to the question, for it is stated that the pauper had the control over the whole of the house (*a*).

Order of Sessions quashed.

(*a*) *Coleridge*, J. was absent on account of a domestic affliction.

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The KING v. The Inhabitants of the Parish of  
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UPON appeal against an order for the removal of *Edith Rogers*, widow, and her children, from the parish of Saint Maurice, in the city of Winchester, to the parish of Sparsholt, in the county of Southampton, the sessions confirmed the order, subject to the following case:

By certain of the regulations for the government of the county bridewell at Winchester, made at the Easter sessions, 1822, and allowed and confirmed by his Majesty's judges at the summer assizes following, it is provided as follows:

1. That the right of appointment of all turnkeys or assistants, employed in the bridewell, be vested in the keeper of the bridewell in the first instance, but that such appointment be subject always to the approbation and confirmation of the visiting justices: that the keeper of the bridewell have power to suspend from the execution of the duties of his station any turnkey or assistant, and to appoint a temporary assistant in his room; but shall, within three days of such suspension, report to the visiting justices the cause for his having so acted, and shall not, until an inquiry has been instituted by the visiting justices, permanently appoint any other person in the room of the turnkey or assistant suspended from office.

2. That the turnkeys of the bridewell shall receive the payment of their salaries from the treasurer of the county, but shall in all other respects be under the immediate orders and control of the keeper of the bridewell: that any turnkey convicted of drunkenness, may be dismissed by the justices:—Held, that a turnkey appointed in pursuance of such regulations, and at an annual salary, is not a *servant* either to the justices or the keeper, so as to be able to acquire a settlement by hiring and service.

By the regulations of a county bridewell, the keeper may appoint turnkeys, subject to the approbation and confirmation of the visiting justices; the keeper may suspend such turnkeys for disobedience or improper behaviour, but must make a report to the justices within three days, and must not make new permanent appointments until the visiting justices have made inquiry: the turnkey is to be paid by the county treasurer, but is to be in all other respects under the immediate orders and control of the keeper: any turnkey convicted of drunkenness, may be dismissed by the justices:—

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well, by whom they may, for disobedience of orders or improper behaviour, be suspended from their situations.

3. That the appointment and removal of the keeper of the bridewell shall be made in strict conformity with the acts of parliament for the regulation of the same.

4. That any turnkey of the bridewell who may be convicted of drunkenness, shall be dismissed by the visiting justices from office.

Rule 20 commences thus: "That no keeper, turnkey, or any other *officer attached to the bridewell*, shall &c."

Rule 21 commences thus: "The keeper of the bridewell, and the *officers of the prison*, together with the keeper's family and servants, shall be required &c."

Rule 26 provides, "That the keeper of the bridewell shall not, without the permission of the visiting justices, lodge or board in his house any persons other than his own family and servants, and those of his *assistants*."

In 1822, and after the allowance and confirmation of the said regulations, *Robert Rogers* (since deceased) was appointed to the office of second turnkey in the said bridewell, by the keeper, in accordance with the above cited regulations, at the annual salary of 45*l.*, which was afterwards advanced to 50*l.*, on his promotion to the office of first turnkey. There was no agreement made, at the time of engaging *Rogers*, for any particular length of service, or for any notice previous to its determination. *Rogers* duly served in that situation from 1822 to 1826, when he married the pauper *Edith*; after which he continued in the same situation till 1833, when he was discharged for misconduct, at a few days' notice, in conformity with the above regulations. The salary of *Rogers* was always paid by the county treasurer, and he resided, during the whole period of his employment as turnkey, in the bridewell, which is situate in the parish of Saint Bartholomew, Hyde, near Winchester.

The question is, whether, under the circumstances above stated, *Rogers* acquired a settlement by hiring and service, in St. Bartholomew, Hyde.

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Sir *Wm. Follett* and *Rawlinson* appeared to support the order of sessions, but were stopped by the Court.

*Dampier*, contrâ. The agreement entered into between the keeper of the bridewell and the pauper was a contract of hiring for a year. There is no difference between this case and *Rex v. Sandhurst* (a). In that case, a pauper was hired by the commanding officer of Sandhurst College, to act as a servant in that establishment: By the terms of the hiring he was to obey all orders of the officers of the institution, and to be allowed weekly wages; and if he wished to quit the college, he was to give one month's notice; but should the college be dissatisfied with his conduct, it retained the power of dismissing him at a moment's notice. It was held that this was a good hiring for a year, and that a settlement was gained by such hiring, although it was not to a private person; the statute 5 W. & M. c. 11, s. 7, only requiring a *lawful hiring* and a service under it. The special case states that the pauper was appointed to the *office* of second turnkey, but this is not conclusive, nor did the sessions intend to find that this was an *office*, since the case states that the pauper was to be paid *wages*. It was not a service for a limited period, for according to the cases of *Turner v. Robinson* (b) and *Fawcett v. Cush* (c), if a party is hired generally at an annual salary, in the capacity of a servant, he is hired for a year. The fact that the servant was to do

(a) 1 Mann. & Ryl. 95; 7 Barn. & Adol. 789.  
Barn. & Cressw. 537; 1 Mann. (c) 3 Nev. & Mann. 177; S. C.  
& Ryl. Mag. Ca. 63. 5 Barn. & Adol. 904; 2 Nev. &  
(b) 2 Nev. & Mann. 829; S. C. Mann. Mag. Ca. 114.

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a particular sort of work only is immaterial, for in *Rex v. Sandhurst* the pauper was to do work only about the college.

Lord DENMAN, C. J.—In *Rex v. Sandhurst* the question was, whether the party could be considered as a servant. The terms of the contract were comprised in the rules of the college, which were as follows: The servants are to obey all orders they may receive from the officers of the institution, the staff serjeants, and the surveyor: They are allowed wages at the rate of 16s. per week, with one dress and one undress suit of clothes per annum, subject to such stoppages as may be ordered, but which shall be paid up every three months, after deducting for the charge of breaking furniture, crockery, &c. belonging to the college, that may have been committed during that period: Should a servant wish to quit the college, he must give one month's previous notice; but should the college see reason to be dissatisfied with his conduct, it retains the power of dismissing him at a moment's notice. The sessions thought that was a general hiring for a year, and there is no reason whatever why it should not be so considered. Here, the appointment is by the head turnkey, subject to the approbation and confirmation of the visiting justices. The confirmation of the magistrates is properly the appointment. The head turnkey has only control over him as an *officer*, and not authority as over a *servant*. Neither was this party the servant of the *magistrates*, because he was not to obey their orders in any particular. He was clearly therefore not a servant to any one. I should not feel myself bound by the statement in the case, that the party was appointed to an *office*, if I could see clearly and manifestly that the nature of the contract was such as to constitute the rela-

tion of master and servant. Such, however, does not appear to me to have been the nature or effect of the contract.

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LITLEDALE, J.—I am also of opinion that the party was not a servant. If he is to be considered as a servant, I do not see *whose* servant he was. He was paid by the treasurer of the county, but he was under the control of the head turnkey.

WILLIAMS, J. concurred (a).

Order of Sessions confirmed.

(a) Coleridge, J. was absent on account of a domestic affliction

The KING v. The Inhabitants of AMERSHAM.

UPON appeal, an order for the removal of *Anna Seumons*, single-woman, from Aylesbury to Amersham, Bucks, was confirmed, subject to the following case:

5th August, 1719. *William Harding* devised certain estates to trustees and their heirs and successors (a), upon trust to employ the rents and profits thereof towards the putting out poor boys and girls who should be children of poor persons—settled inhabitants within the

(a) These trustees not being a corporation, their successors, if not heirs of the survivor, would

The trustees of a charity bound out an apprentice to R.: The consideration money expressed in the indenture was 10*l.* paid by the trustees: Previously to the execution of the indenture the apprentice's grandfather, who was no

party to the indenture, had agreed with the mistress that the premium should be 25*l.*; and subsequently to the execution the grandfather paid to the mistress 15*l.*: Of the contract, or of the payment of any sum beyond the 10*l.*, the trustees were entirely ignorant. Held, that the agreement by the grandfather to pay the additional sum of 15*l.* was a binding agreement, and that therefore the indenture was void by 8 Ann. c. 9, s. 39, for not stating the full consideration.

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parish of Aylesbury or of Walton, apprentice, in such manner as in his will is directed.

8th May, 1827. By indenture between *William Rickford* and others, esquires, trustees of the public charity of the said *William Harding*, for putting out poor children apprentices, of the first part; *Anna Seamons*, daughter of the late *J. Seamons*, a poor person and settled inhabitant within the parish of Aylesbury, of the second part; and *Catherine Read*, spinster, of Amersham, of the third part: *Anna Seamons*, by the nomination and placing of the said trustees, bound herself apprentice to *Catherine Read* for seven years, to learn the art or business of a dress-maker; and the said *Catherine Read*, in consideration of the sum of 10*l.*, of lawful money, to her paid by the said trustees, out of the said public charity of the said *William Harding*, covenanted to teach *Anna Seamons* the art and mystery of a dress-maker.

The indenture was executed by *Anna Seamons* and *Catherine Read*, in the presence of, and attested by *John Parrott*, agent to the trustees of the said charity, and he paid the sum of 10*l.* (mentioned in the indenture) to *Catherine Read*, the mistress, as a consideration for taking the pauper as an apprentice. *Catherine Read* signed a receipt, indorsed upon the indenture, and attested by *John Parrott*, for the sum of 10*l.*, "being the full consideration money within mentioned to be by the said trustees to her paid."

One *Dawney*, the pauper's grandfather, had, in April in the same year, applied to *Catherine Read* to take the pauper apprentice, and on that occasion *Dawney* agreed to pay, and *Catherine Read* agreed to receive, a premium of 25*l.* *Catherine Read* did not know, until she came to Aylesbury and was introduced to the trustees, that any part of the premium she was to receive was to be paid from the funds of *Harding's* Charity; and upon

her going before the trustees to complete the binding, no conversation took place between her and the trustees, or any of them, or between her and Mr. *Parrott*, respecting any additional sum to be paid to her by Mr. *Dawney* with the apprentice; nor did it appear that the trustees, or Mr. *Parrott*, knew or suspected that any additional sum was so paid or contracted for, beyond the sum mentioned in the indenture. After the execution of the indenture, *Catherine Read* received from *Dawney* 15*l.*, to make up the sum of 25*l.* which had been agreed upon.

The pauper served three years under the indenture.

The question is, whether the indenture is void by reason of the full consideration for the binding not being set out in the indenture, according to 8 *Ann.* c. 9, s. 39. If it is void, the order of sessions is to be quashed; but if it is not, the order of sessions is to stand.

Sir *W. Follett* and *Bligh*, in support of the order of sessions. The trustees of the Charity and *C. Read* are the parties to the indenture. The sum paid by the trustees is 10*l.*, and that sum is inserted in the indenture. True it is, that there was an agreement between the grandfather of the apprentice and *C. Read*, that an additional sum of 15*l.* should be paid; but that contract was not valid. By 8 *Ann.* c. 9, s. 39, it is enacted, that all indentures of apprenticeship wherein shall not be truly inserted and written the full sum and sums of money received, or in anywise directly or indirectly given, paid, secured, or contracted for, with or in relation to any apprentice, shall be void, and the apprentice shall be incapable of being free of any city. The question to be considered is, whether this provision does not refer to a contract between the parties to the indenture. In *Rex v.*

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*Burton-upon-Dunsmore* (a) a boy was bound apprentice by his stepfather, and in the indenture of apprenticeship the premium was expressed to be 10*l.* only. It appeared, however, that the boy's mother, without the knowledge of her husband, or of her son (the apprentice), had agreed to give the master a further sum for taking the boy, and did, in fact, subsequently give him 2½ guineas: It was objected, that the true consideration was not stated in the indenture, and that therefore it was void under 8 *Ann.* c. 9, s. 39; but the Court held that the indenture was binding, for that there was no valid contract by any person to pay more than the sum mentioned in the indenture. So here, there was no binding contract to pay more than 10*l.* *Rex v. Burton-upon-Dunsmore* was recognized by Lord Tenterden in *Rex v. Baildon* (b), in which the Court held that an indenture of apprenticeship expressed to be made in consideration of 4*l.*, paid by a public charity, but really made in consideration of such 4*l.*, and of 1*l.* privately agreed to be paid by, and subsequently to the execution of the indenture actually paid by the apprentice's mother, *who was a party to the indenture*, was invalid. The fact of the party who contracted to pay the additional sum being a party to the indenture sufficiently distinguishes *Rex v. Baildon* from the present case. In *Rex v. Aylesbury* (c), a pauper was bound out by the trustees of a public charity: The master covenanted to find him meat, drink, washing, and lodging, and all other things needful during the apprenticeship: Before the indenture was executed, the father of the apprentice, who was no party to it, agreed with the master to find the apprentice clothing and washing during the term of apprenticeship, and he accordingly did so during a great part of the time. It

(a) 4 Mann. & Ryl. 631; 9  
 Barn. & Cressy, 872; 2 Mann.  
 & Ryl. Mug. 361.

(b) 3 Barn. & Adol. 427.  
 (c) Ibid. 569.

was held by the Court that the indenture did not require to be stamped, because either the agreement by the father to provide clothes was not a thing secured to be given to or for the benefit of the master within the 55th Geo. 3, c. 184, (the Stamp Act,) or, assuming that it was, then it was void as being a fraud on the trustees, who had bound out the apprentice on the faith that the master was to provide clothes. In this case the trustees, who are the parties to the indenture, were ignorant of the contract to pay an additional sum of money, and that contract was a fraud upon the trustees, and therefore invalid. At the period when the statute of *Anne* was passed there were great restrictions as to carrying on trade in particular cities. It could scarcely be intended that the apprentice should be prevented from setting up trade, because some party unconnected with the indenture, had promised the master an additional premium.

*Campbell*, A. G., contra. The person who receives the money is a party to the indenture. He was stopped by the Court.

*Channell* was to have argued on the same side.

Lord DENMAN, C. J.—*Rex v. Aylesbury* does not clash with the former case of *Rex v. Baildon*. Indeed it would be strange if it did, as the latter was decided only ten days after the former. I do not see how the contract to pay an additional sum beyond that inserted in the indenture can be fraudulent against the trustees.

*Rex v. Baildon* decided that an indenture executed under circumstances similar to the present was void. The legislature has imposed this penalty on the master,—that if he defrauds the revenue he shall have no control over his apprentice.

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LITTLEDALE, J., and WILLIAMS, J. concurred (a).

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Order of Sessions quashed.

(a) *Coleridge*, J. was absent on account of a domestic affliction.

The KING v. The Inhabitants of PAKEFIELD.

Where the hirer of a tenement, consisting of a house and land, sells the growing crops before the expiration of the year, and retains possession of the house only, he is not the occupier of the tenement during the whole of the year, so as to gain a settlement under 1 Will. 4, c. 18.

*A.*, hiring a house in the parish of Dale, before the end of the year leaves the parish, with his goods and with that part

of his family who resided with him. A son of *A.*, who had previously resided with *A.*, by the direction of *A.* sleeps in the house till the end of the year, boarding with his master in another part of the parish. This is not a continuance of occupation in *A.* for the purpose of gaining a settlement.

So, although *A.* leaves in the house a portion of his goods, which cannot be conveniently removed.

Payment of rent by a trustee, out of the produce of effects assigned to him by the tenant, in trust for the payment of the rent and taxes, and other charges and expenses in respect of the land occupied by the tenant, and of debts, is not a payment by the tenant within 1 Will. 4, c. 18, for the purpose of gaining a settlement.

UPON appeal, an order of justices, whereby *Edmund Reader*, and two of his children, were removed from the parish of Pakefield, in the county of Suffolk, to the parish of Walpole, in the same county, was quashed, subject to the following case:

A settlement having been proved in Walpole, the sessions held that a subsequent settlement had been acquired in Pakefield. It appeared that on old Michaelmas-day, 1832, the pauper entered upon the occupation of a beer-house and several acres of land, in Pakefield, which he had previously hired for a year, at a rent of 30*l.* for the house and land, and 10*l.* for certain brewing utensils in the house. He continued to occupy the house and land until July following. On the 17th of that month, being in embarrassed circumstances, he by indenture assigned all his farming implements, stock, crops, and all other his personal estate and effects, to one *Thomas Waterson*, for the benefit of his creditors.

indenture (a) (which it was agreed should be considered as part of this case) was executed by *Waterson*

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By this indenture, between pauper of the first part, *Waterson* of the second part, and pauper's creditors of the third after reciting that the pauper indebted to these several parties to, of the third part, in the placed opposite to their relative names, the pauper bargained, sold, and assigned to *Waterson*, his executors, administrators and assigns, "all and singular the debts and sums of money now due and owing to him the said *Edmund Reader*, (the creditor,) and all securities and bonds of account for or relating to the same, and all and singular the stock, effects, and utensils in trade, household goods, furniture, of him the said *E. R.*; and also the crops of grain, and hay, whether growing or severed, muck, sumland, implements of husbandry, cattle, live and dead stock, from the said *E. R.*, now growing in and upon or about the waste or tenement, outhouses, and hereditaments, in his possession, in Pakefield aforesaid, and all other the personal estate and effects whatsoever and whosoever of him the said *E. R.* and which he shall be possessed of, interested in, or entitled to, at the execution of these presents, (the necessary wearing apparel of himself and family excepted), and all the estate, right, title, and interest whatso-

ever, of him the said *E. R.* in and to the same:" Habendum to *Waterson*, his executors, administrators and assigns,—upon trust that *Waterson*, his executors or administrators, should thenceforth cultivate and manage the said lands, as the various crops now growing and being thereon should require, and for that purpose should employ such persons as he or they might think proper, and use the cattle and implements then being upon the premises, in the management and getting in of the said crops, and generally to do therewith as to him or them should seem meet, and should, subject to the provision thereinbefore contained, sell and dispose of the said stock in trade, effects, household goods, furniture, crops of grain, corn, and hay, chattels, and other effects, thereby assigned, by public auction or by private contract; and should get in all debts &c., and receive the amount of the valuation to be made upon the said land, as between outgoing and incoming tenant, at the quitting and giving up of the same. Declaration: that *Waterson*, his executors or administrators, should stand and be possessed of the moneys to arise from the sale and disposition of the stock in trade, goods, &c. upon trust, first, to pay all the expenses attending the preparing and executing the indenture, and the

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and the pauper, and under it *Waterson*, on August following, sold all the pauper's stock, implements, furniture, and other effects, and crops then growing upon the land. The crops and carried away by the purchasers, but the s colder were left upon the premises. Part of t ture was purchased for the pauper, but after he was not in possession of any farming imp or any stock, excepting a pig, which, after t were carried off, was turned out upon the land pauper paid no rent himself, but *Waterson* paid t lord 31*l.* 10*s.* towards the rent,—21*l.* 13*s.* out of duce of the sale of the pauper's effects, and 9*l.* the summer tilths and muck on the land, and fixtures in the house, taken by the landlord at t The pauper, with his wife and four children, c to live in the house and carry on the business, beer there and making profit thereof, buying bringing it from Lowestoft, as he wanted it; c he lived till Tuesday the 8th October, 1833, o day he removed to a house which he had previous at Yarmouth, distant about 12 miles from P taking with him his wife and three children, and effects, except a few articles of furniture, whi left in the house at Pakefield, because the wag

carrying the trusts thereof into effect, and also the expenses of managng the lands; next, to discharge the rent, rates, taxes, and tithes, then or during the continuance of the trusts thereby created, to be due and owing in respect of the premises occupied by the pauper, and the expenses of selling, collecting and receiv- ing the said effects; and lastly,

upon trust to pay and residue to and amongst ditors, who should bec ties thereto, within thre ratably and in proportic said debts, to be ver proved as therein m Covenant from the cre to take any proceedings, the pauper, if sued, mi the indenture in bar.

ployed by the pauper to remove his goods was not large enough to carry them all. The things left behind were to have been brought to Yarmouth on the following day, but were not in fact sent until the Thursday. The pauper left the key of the house with his son, with a command not to give it up to the landlord till (old) Michaelmas-day. The son, who had lived with his father, continued to sleep in the house, having his clothes and chest there, until the Thursday or Friday, and on the Friday, which was (old) Michaelmas-day, delivered the key to the landlord, and went to lodge at the house of his master, a miller, residing at Pakefield, with whom he had boarded from the day his father left the parish. The pauper and his wife and three children continued to reside at Yarmouth, from the 8th October, for several months, and did not return to Pakefield until a short time before they were removed, under the order, to Walpole.

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*Biggs Andrews*, and *Austin*, in support of the order of sessions. By 1 Will. 4, c. 18, it is enacted, that no person shall acquire a settlement by reason of a yearly hiring of a tenement, unless such tenement shall be actually occupied under such yearly hiring, by the person hiring the same, for one year, and unless the rent for the same, to the amount of 10*l.* at least, shall be paid by the person hiring the same. The first question which arises in the present case is, whether there was a payment of rent by the person hiring the tenement. The rent must be considered in this case as paid by the pauper. It is true that the rent was not paid by the pauper's own hand, but it was paid with his money and by his authority; and that is a sufficient compliance with the statute. If goods were given by the person hiring the tenement, to his agent, to convert into money, and with the pro-

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 Payment of  
 rent.

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ceeds to pay the rent, that would be a sufficient payment within the meaning of the statute. Here, there is an assignment upon trust to sell the crops and goods, and out of the proceeds to pay the rent. The trustee was bound to pay according to the directions given him by the deed. The payment by the trustee was similar to a payment by an agent. If it was not a payment by the pauper, by whom was it a payment? It was not a payment by the trustee, as it was not made with his money.

Second point:  
 Occupation.

The second question which arises is, whether there was an actual occupation of the house by the pauper for one whole year. It may perhaps be argued that there was no such occupation, on two grounds: first, that the pauper had assigned the crops upon the land to another person; and secondly, that there were three nights at the conclusion of the year during which he did not sleep in the house. With respect to the first ground: It is true that a purchaser from the trustee would have a right to enter the land, in order to reap the crops; but the pauper retained a control over the lands, and a right to reside on the premises, the only restriction upon him being that he should do no injury to the crops which he had sold. It was decided in *Rex v. St. Nicholas, Rochester* (a), that there must be an actual occupation of the premises; but in a case decided this term (b), it was held, that the circumstance of another person's having a right to enter the premises, does not prevent the party hiring them from being in the actual occupation. It is evident that the pauper was in the actual occupation;—for who could maintain trespass if the pauper could not? Not the assignee; for he had only a right of entering to take the crops. Then as to the second

(a) 3 Nev. & Mann. 21; 5 Barn. & Adol. 219; 2 Nev. & Mann. Mag. Ca. 1.  
 (b) *Rex v. St. Giles in the Fields*, ante, 476, *sed quare*.

ground: It is not necessary that a person should sleep every night on the premises which he rents. Such a proposition would be absurd. Could it be said that a coachman to a night-coach, who slept every alternate night in the tenement, could not gain a settlement? It was laid down in *Rex v. Willoughby* (a), that there may be a personal *occupation*, though the party do not *reside* on the premises.

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*Manning*, (with whom was Sir *W. Follett*), contrâ. It Second point. has been asked, who could maintain trespass if the pauper could not. In *Carter v. Warne* (b), which is recognized in *How v. Kennett* (c), it was decided, that words similar to those contained in the operative part of the conveyance in this case, were sufficient to convey the legal estate of a term. The residue of the term of one year therefore passed to *Waterson*, the assignee, and he, and not the pauper, might have maintained trespass. By the deed, the trustee was to sell the crops; and to enable him to do that, it was necessary that he should have a legal estate in the term, in order that he might give the purchasers a right to enter and reap the crops. It cannot be contended, that if a person takes a lease for a year, and assigns it before the lease has expired, that he can be considered as renting and occupying a tenement for one whole year, within the meaning of the statute of 1 Will. 4. [*Coleridge, J.* If you look at the habendum you will find that it was not the intention of the parties to convey the term. The assignee is to hold the premises as and for his own goods, chattels, and effects. I do not mean to say that the words here used might not be sufficient to convey the term, if from the whole deed it could be collected that such was the intention of the parties. There is no trust as to the

(a) 5 Nev. & Mann. 457; 3  
 Nev. & Mann. Mag. Ca. 335.

(b) 4 Carr. & Payne, 191.  
 (c) 5 Nev. & Mann. 1.

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possession of the land.] The language of this deed is similar to that in *Carter v. Warne*.

In point of fact, the pauper did not occupy the premises for a year. Before the expiration of a year, he removed to a distant parish, taking with him his wife, his family, and his furniture. It was mere accident that a small portion of his furniture was left behind. The sleeping in the house by the son was merely colourable; he boarded in the house of the person to whom he was apprenticed.

First point.

Then with respect to the question whether the payment of rent was a payment by the pauper: After the execution of the deed, the pauper had no control over the property. The trustee held it for several purposes besides that of paying the rent.

Here he was stopped by the Court.

LORD DENMAN, C. J.—There was neither an actual occupation for a year, nor a payment of rent by the party hiring the tenement.

Second point.

The assignment gave the assignee power to enter, which destroyed the pauper's right of exclusive occupation.

First point.

After the pauper had parted with the whole of his personal estate, the application of part of the proceeds of that personal estate by the trustee in the payment of rent, cannot be said to be a payment of rent by the pauper.

LITLEDALE, J.—I think so also. The pauper has conveyed all his interest to another for a valuable consideration. Surely he cannot be said to have been in the actual occupation, nor can this be considered as a payment by him.

WILLIAMS, J.—I am of the same opinion. The pauper, from the 17th July, parted with the possession of the whole or a portion of the right of occupying the land. That being so, it is impossible to say that he had an undivided occupation; and there was no actual occupation.

I agree also with the rest of the Court, in thinking that the payment in this case cannot be considered as equivalent to a payment by the pauper himself. The only control which the pauper could exercise over the land would be after payment of the debts.

COLERIDGE, J.—I agree with my brother *Williams* in the last point. This cannot be considered as a payment by one person, by the hands of another. The trustee might or might not have paid the rent, whether the pauper had chosen or not. Although the rent was paid out of a fund raised by a sale of the pauper's effects, it was a payment by the trustee, and not by the pauper.

I agree also as to the occupation. Though I do not think that there was de facto an *assignment* of the term, yet the land was in the *possession* of the vendee of the crops. The pauper merely continued to live in the house.

Order of Sessions quashed.

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Second point.

First point.

Second point.

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## The KING v. BOULTBEE.

Where it is enacted, generally, that no summary conviction in pursuance of the act shall be removed by certiorari into a superior Court, a certiorari may, nevertheless, be issued at the instance of a private prosecutor, although the application be not made by the Attorney-General, and the Crown is not directly interested.

Where an appeal to the quarter sessions is given by a statute against any conviction under it, to any person aggrieved by such conviction, provided he give to the respondent a notice in writing of such appeal, and of the cause and matter thereof, and the court of quarter sessions are directed to hear and determine the matter of the appeal, that court can adjudicate only on the matter stated in the notice.

And therefore where, in the appellant's notice, grounds of appeal relating to the *merits* only are stated, the sessions cannot quash the conviction for defect of *form*.

ON 24th January, 1834, one *Pickering* was convicted by a magistrate of Warwick, on the information and complaint of *John Boulton*, Esq., of having, on 18th January then instant, unlawfully committed a certain trespass, by entering and being in the day-time of the same day upon certain land, in the possession and occupation of one *John Roobottom*, in search of game, with a dog and a gun, contrary to the statute: and by the conviction it was adjudged, that *Pickering* should for the said offence forfeit 1*l.*, and should pay that sum, together with 10*s.* for costs, forthwith; and it was directed that the 1*l.* should be paid to *John Breedon*, one of the overseers of the parish in which the offence was committed, to be by him applied according to the directions of the statute; and it was ordered that the 10*s.* for costs should be paid to *Boulton*, the complainant.

Seven days previously to the holding of the quarter sessions, *Pickering* gave notice of his intention to appeal to the sessions against the conviction. This notice stated several grounds of appeal, all of which were matters of *substance*; and concluded with notice that the appellant would, on the trial of the appeal, insist upon all other causes, matters, and things which he could or lawfully might do.

On the hearing of the appeal, it was objected by *Pickering* that the conviction was bad, inasmuch as there was no adjudication (in accordance with a form of a conviction given in 1 & 2 *Will.* 4, c. 32, s. 39,) that, in default of payment of the penalty and costs, he, *Pickering*

should either be imprisoned, or imprisoned and kept to hard labour, for a certain period of time. The sessions quashed the conviction *for want of form*, and ordered *Boulbee* to pay the costs. The conviction was removed into this Court by a writ of certiorari, obtained at the instance of *Boulbee*, who also obtained a rule calling on *Pickering* to shew cause why the order of sessions should not be quashed. *Pickering* obtained a rule, calling on *Boulbee* to shew cause why the writ of certiorari should not be quashed quia improvidè emanavit. These two rules came on for argument at the same time.

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*M. D. Hill* and *Fitzroy Kelly*, for *Pickering*. By the 45th section of 1 & 2 Will. 4, c. 32, the certiorari is taken away. The general rule of law is, that *the Crown* is not bound by a clause of this description; but that rule applies only where the Crown itself is directly interested, and appears by the Attorney-General. It does not apply to cases in which the prosecutor is a private individual. In *Rex v. Allen (a)*, which arose on 48 Geo. 3, c. 74, in which there was a provision taking away the certiorari in terms similar to those of the present statute, it was held that a certiorari might issue at the instance of the Crown. There, however, the Attorney-General appeared on behalf of the Crown, which was directly interested, the prosecution being at the instance of certain officers of the Excise; and the ground of the judgment was, that general words in an act of parliament, that no certiorari shall be allowed, do not bind *the Crown*, unless such an intension is to be collected from other parts of the statute. In all similar cases in which a private individual has been allowed to issue a certiorari, it has been where the individual has been the *prosecutor*, and has been attempting to enforce a conviction. In this case *Boul-*

First point:  
 Whether general words, taking away the certiorari upon a conviction, extend to a private prosecutor.

(a) 15 East, 333.

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Second point :  
Jurisdiction of  
the sessions.

*bee* is in this Court the *defendant*, and his object is to quash the order of sessions.

If the conviction be bad in substance, this Court will order it to be quashed, although the clerk of the peace has stated that the sessions quashed it for want of form. The 39th section gives a form of conviction, in which the judgment is in the alternative, viz. that the party convicted either pay a sum of money, or, in default of payment, be imprisoned. [Lord *Denman*, C. J. Suppose that, the moment the party was convicted, he had produced the money, would it be necessary to pronounce the judgment that he must either pay the money, or, in default of payment, be imprisoned?] In that case there would be no necessity to draw up any conviction. If, however, from any circumstance it becomes necessary to draw up the conviction, the conduct of the defendant cannot obviate the necessity of pursuing the form of conviction given in the act of parliament. The magistrate has a special power given to him by statute, which power must be exercised by him in the mode pointed out by the statute. Where an offence is created by statute, and a certain mode is pointed out for the recovery of the penalty imposed, it has always been held that such mode must be *strictly* pursued. If the party had been indicted for disobeying this conviction, and had been convicted, a different and a heavier punishment might have been inflicted upon him than that which the magistrate would have awarded as the other alternative, in case of the non-payment of the fine. The legislature has imposed upon the magistrate a double duty—to inflict a fine and to direct what shall be the consequence of non-payment. In case of a felony created by act of parliament, if any part of the judgment imposed by the act be omitted, the judgment is void. The magistrate in this case has omitted part of the judgment. This then is an

imperfect judgment, bad in substance, and a judgment which could not be enforced. It was therefore the duty of the sessions to quash it.

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*Bere and W. Daniel, for Boultee.* There is no case in which the distinction contended for between a prosecution at the instance of an individual and a prosecution at the instance of the Crown has been recognized. In *Rex v. Bodenham(a)*, which was an indictment on 13 Geo. 4, c. 78, for a nuisance in a highway, the prosecutor was a private individual, and yet it was held that he might remove the indictment by certiorari. *Rex v. Farewell(b)* is a case to the same effect. *Rex v. Cumberland(c)* and *Rex v. Davies(d)* also establish the same principle. *Rex v. Allen* did not, as suggested on the other side, proceed upon the ground that the prosecution related to a matter in which the Crown itself was directly interested, and that the Attorney-General appeared in support of the certiorari. The language of *Bayley, J.*, in giving judgment in that case is general.

If the sessions had no *jurisdiction* to quash the conviction, the certiorari is not taken away; *Rex v. Fowler(e)*. By the terms of the statute, it is necessary for the appellant to state his grounds for complaining of the conviction. The notice of appeal mentions several grounds, but none of them were objections relating to the *form* of the conviction. The sessions had no authority to inquire into any thing not stated in the notice. They had therefore no authority to quash the conviction for defect of form. [Lord Denman, C. J. The appellant may have seen the conviction for the first time at the sessions. It is impossible for the sessions to confirm

(a) Cowper, 78.

(b) 2 Stra. 1409.

(c) 6 T. R. 194.

(d) 5 T. R. 626.

(e) 3 Nev. & Mann. 826; 1 Adol. & Ellis, 836; 2 Nev. & Mann. Mag. Ca. 403.

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a vicious conviction. When a conviction is produced, and a fatal objection pointed out, can they confirm it? (a)] If the defect be a matter of form, and the statute contains a similar provision to the clause in this statute with respect to the notice of appeal, there is no reason why the sessions may not confirm the conviction. [Lord Denman, C. J. That is another question. Where the party appealing has a knowledge of the instrument against which he appeals, as under the Poor Law Amendment Act, it might be so held. But this is not the same case. There the appellant sees the order of removal, and the sessions might fairly say to him, "As you have not pointed out the defect in point of form in your notice, we will not discharge the order of removal for such a defect." But how could it be so said on an appeal against a conviction, which the party has not an opportunity of seeing until he comes to the sessions?] The words of this statute and those of the Poor Law Amendment Act are nearly similar; and the hardship of the case ought not to weigh with the Court when construing this statute. [Williams, J. Suppose, in a case which a statute required should be heard by two justices, it appeared by the conviction that the hearing was by one justice only, and the notice of appeal had not stated this as a ground of appeal.] In that case it would not be necessary for the party to appeal. Here, if the act of parliament had not required the ground of appeal to be stated, the sessions might have quashed the conviction. If, in his notice of appeal, *Pickering* had stated that he was not guilty, that would have put in issue every thing material to the merits of the case. Assuming that if there were a defect in *substance* in the conviction,

(a) Acc. M. 5 E. 4, fo. 7, pl. 15; M. 7 E. 4, fo. 10, pl. 11, fo. 22, pl. 25; *Heydon's case*, 11 Co. Rep. 8 a; *The Protector v. Geering*, Hardres, 85, 99.

the sessions had authority to quash it on that ground, yet that is not the case here. In the return to the certiorari, it is stated that the conviction was quashed for want of form. The statute expressly says that no conviction shall be quashed for want of form; and therefore the sessions have exceeded their jurisdiction.

The conviction is *not* defective in point of form. It is absurd for the defendant to contend that a full measure of punishment has not been inflicted upon him. This is only a valid objection when urged by the prosecutor. [Lord Denman, C. J. I recollect a case in which Gibbs, C. J., directed a jury to give the plaintiff such damages as he had sustained by reason of his *not* being imprisoned.]

At all events, if the sessions quash the conviction for want of form, they have no power to give costs.

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Third point:  
Costs.

LORD DENMAN, C. J.—This is a very complicated case. Two rules were obtained; the one calling upon *Boulton* to shew cause why the certiorari should not be quashed; the other calling on *Pickering* to shew cause why the order of sessions should not be quashed.

The conviction took place under the statute 1 & 2 Will. 4, c. 92; and the defendant had a right of appealing to the sessions. That right was accompanied with the following condition:—"Provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction and seven clear days at the least before such sessions, &c., and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order thereon, with or without costs to either party, as to the court shall seem meet; and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the offender to

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be dealt with and punished according to the conviction, and to pay such costs as shall be awarded; and shall, if necessary, issue process for enforcing such judgment." The appeal having been made to the sessions, and a notice of appeal regularly given, we are to inquire what was the "*matter of the appeal*." It was necessary that the notice should contain *some* cause and matter of the appeal. This notice contains three objections, which all relate to the merits of the case. The "*matter of the appeal*" was that which was stated in the notice; and therefore the sessions were bound to inquire into the merits of the appeal according to the notice;—whereas, instead of so doing, they quash the conviction for want of form. In all probability the conviction was not seen by the defendant until the hearing. It might not have been drawn up until the morning of the day of the hearing; and therefore the notice could not apply to defects in the *form* of the conviction. The justices have determined the appeal on what they term matter of form. Supposing it to be matter of form, the defect was cured by the statute. If the defect be matter of *substance*, the order would bind no one. As it is, it appears that the sessions have tried that which was not stated in the notice. The sessions have therefore taken upon themselves to do that which they had no right to do. The intention of the legislature was, that no defect in matter of form should vitiate a conviction, and that no question of fact should be tried which was not stated in the notice.

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But then there is a section in the act which declares that no summary conviction in pursuance of the act, or adjudication made on appeal therefrom, shall be quashed for want of form, or removed by certiorari or otherwise into any of his majesty's superior Courts of record. The language of that section would appear, in the absence of any decisions, to deprive not only *individuals*, but the

*Crown*, of any right to remove the proceedings by certiorari. But it has been repeatedly held that the Crown is not deprived of its right of removal by certiorari, by similar general language. A distinction was attempted in *Rex v. Farewell*, which was pressed in *Rex v. Bodenham*, that although the *Crown itself* is not deprived of the right to issue a certiorari, yet a private prosecutor is so; but this Court said, in *Rex v. Bodenham*, that there is no such distinction. That case has not been overruled. In *Rex v. Allen* it was quoted without disapprobation; and although *Grose, J.*, and *Le Blanc, J.*, determined that case on the ground that the case was a proceeding for penalties in which the Crown was interested, yet *Bayley, J.*, does not so limit his judgment or make any such distinction. After much fluctuation of opinion, it is settled that the right of issuing a certiorari is not taken away from prosecutors in general, by language similar to that contained in this act.

For these reasons I am of opinion that the sessions have done that which they were not entitled to do, and that the certiorari properly lies. The consequence will be, that the rule for quashing the certiorari will be discharged, and the rule for quashing the order of sessions made absolute,

LITLEDAL, J.—Two rules have been obtained in this case, which have originated from the following circumstances:—*Boulton* proceeded against *Pickering*, who was convicted before the justices under 1 & 2 Will. 4, c. 32. *Pickering* appealed, and the conviction was quashed. *Boulton* sued out a certiorari, and obtained a rule for quashing the order of sessions. Then *Pickering* obtained a rule, calling upon *Boulton* to shew cause why the certiorari should not be quashed quia im-providè emanavit.

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 First point.

It is argued that there was no authority to grant the writ of certiorari, because it is taken away by the 45th section. The words of that section are general; and the question is, whether *Boulbee*, who was the original prosecutor, had the right to remove the conviction by certiorari. It has been understood as law in the profession, that the Crown is not bound by a statute unless it be expressly named. In support of that general principle, several cases have been cited by my lord, which it is not necessary further to notice, as I entirely concur in what has fallen from his lordship. But it is said that those authorities do not apply, because they are cases in which either the Attorney-General applied for the certiorari on behalf of the Crown, or the Crown was directly interested. But that is not so. It is also urged that in those cases the application was made by a party for the purpose of enforcing the conviction; whereas, in the present case, *Boulbee* does not apply to enforce the conviction, but to get rid of the costs; and that therefore he stands in the character of a *defendant*, and in one of these rules he is called *the defendant*; and the proceedings are entitled *Rex v. Boulbee*; but this is drawing a very fine distinction. Though he is nominally the defendant, still he is in reality the prosecutor in the proceedings below; and all that the objection amounts to is this, that he is called the defendant by the course of the proceedings in this Court. Inasmuch as he is the prosecutor below, he is not, in my opinion, barred from the privilege of issuing a certiorari.

Second point. The proceedings are then before us by virtue of the certiorari; and the other rule calls upon *Pickering* to shew cause why the order of sessions should not be quashed. That order recites the proceedings before the court of quarter sessions, and their adjudication thereon, which is, that the conviction be quashed *for want of*

*form.* By the 44th section an appeal is given, provided that within a certain period the appellant give to the complainant a notice in writing of such appeal and the cause and matter thereof, and the court of quarter sessions are to hear and determine *the matter of the appeal*. Here, the notice of appeal contains three grounds. Those therefore were the matters to be tried. Has the court of quarter sessions tried the matter of appeal? They have ordered that the conviction be quashed for want of form. As want of form was not mentioned as one of the grounds of appeal, the sessions have not decided the matter of appeal. It is very true that it might be impossible for the appellants to give notice of any defect of form in the conviction, as notice of appeal is to be given within three days after the conviction takes place. But this cannot affect the construction of the act. The sessions have *no right* to enter into the discussion of any other matter than such as is stated in the notice of appeal; and they had certainly no right to quash the conviction for want of form, when the statute expressly says that no conviction is to be quashed for that reason. They have therefore exceeded their authority; and the order of sessions should be quashed.

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WILLIAMS, J.—I am of the same opinion. The cer- First point.  
 tiorari is clearly not taken away. The distinction sup-  
 posed to exist between this case and *Rex v. Allen* does  
 not arise, as was expressly decided in *Rex v. Bodenham*.  
 The next question is, whether the order of sessions Second point.  
 should be quashed; and I think that it should. The  
 power to appeal is given by the act with many conditions;  
 of which one is, that the appellant shall, in his notice,  
 state the grounds of appeal. *Pickering*, in this case, did  
 give notice of the matter of his appeal,—which went to  
 the merits of the case. By the act, the sessions are to

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determine the matter of the appeal. They have proceeded beyond their jurisdiction, and have adjudicated that the conviction was bad for want of form. I will only add, that if the objection to the conviction itself was of such a nature as shewed that the magistrates had no jurisdiction, the conviction could never be available, and could not be supported; and that if it was any thing short of that, it was matter of form, and therefore within the enactment that no proceedings shall be quashed for want of form.

Rule for quashing the certiorari discharged.

Order of Sessions quashed.



**MORELL v. HARVEY.**

In a cognizance for a highway-rate, made for the purposes mentioned in the 30th and 45th sections of 13 Geo. 3, c. 78, such rate must be expressly alleged to be an equal assessment of 9d. in the pound on the yearly value of the lands, &c. The statement of its being an equal assessment of 9d. in the pound upon all occupiers of lands &c. within the

**REPLEVIN.** Cognizance as constable of the hundred of East Barnfield, Kent, under a warrant of distress. The cognizance stated that the plaintiff was the occupier of certain lands &c. within the parish of Hawkhurst, of large yearly value, and by law liable to be assessed for and towards the amending &c. of the highways &c. within the parish, according to the form of the statute &c., in respect of his occupation of the said lands &c., and that *L. B.* and *J. N.*, during all the time aforesaid, were surveyors of the highways within the said parish, and as such surveyors, on 4th October, 1832, at a special sessions for the highways, held at &c., before *L. N.* and *T. L. II.*, justices &c. made application to the said justices, and prayed them that an order might be granted for making an assessment of 9d. in the pound upon all occupiers of lands &c., within the said parish, and that &c. within the parish, is not sufficient.

the justices at such sessions being satisfied that the statute duty &c. had been performed &c., and that due notice of the intention to apply to the special sessions had been given, did, by their order in writing, order that an equal assessment, not exceeding 9d. in the pound, upon all occupiers of land &c. within the parish, should be forthwith made by the surveyors, and be allowed and collected, and that the money be applied for and towards the amending &c. such highways &c. The cognizance then stated that due notice of the application had been given; that in pursuance of the order, an equal assessment, not exceeding 9d. in the pound, upon all and every the occupiers of lands &c. within Hawkhurst, was made and duly allowed; that the plaintiff was assessed for and in respect of the said lands &c. then in his occupation within the said parish, in the sum of 45l. 18s. 4½d., being after the rate of 9d. in the pound; that 31l. 0s. 9¾d., parcel thereof, was unpaid; that the surveyor made complaint, and that a distress-warrant was granted; and the defendant justified under the distress-warrant.

Special demurrer for (inter alia) the following cause: that the cognizance ought to have shewn that the order for an assessment was an order for an assessment of so much in the pound, *on the yearly value of the lands &c.* in the parish &c., and that the assessment was such an assessment accordingly; neither of which is shewn.

*Wightman*, in support of the demurrer, contended that it ought to have appeared that the assessment was made on the *yearly value of the lands*, and that the order did not follow the words of the act; *Gill v. Scrivens* (n).

*Channell*, contra, contended that the assessment was

(n) 7 T. R. 27.

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authorized by the 45th section, no sixpenny rate having been made under the 30th section, and that the assessment was in the terms of the 45th section. Several other points were argued, upon which no judgment was given.

*Cur. adv. vult.*

The judgment was subsequently delivered by

Lord DENMAN, C. J. as follows:—The defendant makes cognizance as bailiff of the hundred of East Barnfield, under a warrant of distress, directed to him by two justices of the peace, for levying a highway assessment. The cognizance avers that the two waywardens made application at a special sessions, for an assessment of 9d. in the pound on all occupiers of lands, tenements, woods, tithes, and hereditaments, and that the justices ordered such assessment upon all occupiers of lands &c. to be forthwith made; and it then proceeds to justify the taking under a warrant of distress issued for non-payment of such assessment.

This cognizance was demurred to for numerous causes, one of which we think raises a valid objection.

The *act* requires that the rate shall not exceed 9d. in the pound, *on the yearly value of the lands &c.* subject to be rated.

The *averment* is, that the assessment was made on the occupiers of lands &c., and that it did not exceed 9d. in the pound, but not (as the statute requires) that it did not exceed 9d. in the pound *on the yearly value of such lands &c.*

The averment that the assessment does not exceed 9d. *in the pound* has of itself no meaning, but must be referred to something, and if, consistently with the ordinary use of words, it can be referred to "lands &c." which are mentioned immediately before, the statement

will still be defective, for the meaning must then be *the value of the lands &c.*, and not their *yearly value*. For this defect, without considering the others alleged, our judgment must be for the plaintiff.

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Judgment for the plaintiff.

MORGAN T. BROWN, Esq., and another.

**DECLARATION** for an assault and false imprisonment. Plea: not guilty. At the trial at the Salop summer assizes, 1834, before *Williams, J.*, it appeared that this was an action brought against two magistrates for Shropshire, for having convicted the plaintiff and one *Parker*, in the penalty of 4s., and in 6s. for costs, for an assault committed on 8d July, 1833, upon one *Yapp*, and having, in consequence of their refusing to pay such sums, committed them to the house of correction at Shrewsbury for fourteen days, unless the money should be sooner paid. The assault arose out of a dispute with respect to the right to the possession of a certain cottage.

Where two are convicted of a finable offence, each should be severally fined. A conviction, imposing a joint fine, will not entitle the magistrates to the protection of 24 G. 2, c. 44, in an action of trespass for levying the amount (a).

The conviction was in the following form:—"County of Salop. Be it remembered, that on &c., at &c. *R. Parker* and *E. Morgan* are convicted before us, *Charles Powell* and *John Brown*, Esquires, two &c., for that they the said *R. Parker* and *E. Morgan*, on &c., at the parish of Hopesay, in the said county of Salop, did violently assault one *E. Yapp*; We, the said justices, do therefore adjudge the said *R. Parker* and *E. Morgan*

(a) Other points raised at the judgment of the Court did not trial were discussed upon the relate to them. motion for a new trial; but the

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for their said offence to forfeit and pay the sum of 4s. and also the sum of 6s. for costs; and in default of immediate payment of the said sums as aforesaid, to be imprisoned in the house of correction at Shrewsbury for the space of fourteen days, unless the said sums shall be sooner paid; and we direct that the said sum of 4s. shall be paid to *Geo. Bright*, one of the high constables of the said parish of Hopesay, to be by him applied according to the direction of the statute in that case made and provided; and we order that the said sum of 6s. for costs shall be paid to the said *E. Yapp*."

The plaintiff and *Parker* were on the same day committed to the house of correction at Shrewsbury, by a commitment which recited the conviction as it is above set out, and directed that in default of immediate payment of "the said sums," the plaintiff and *Parker* should be imprisoned in the house of correction for the space of fourteen days, unless the "said sums" should be sooner paid.

It was contended by the plaintiff that the conviction was bad on several grounds, of which one was, that by such conviction *one joint fine* was imposed upon two individuals, so that neither could be liberated without paying the whole fine. The learned judge was of opinion that the conviction was bad on account of its imposing a joint fine; and a verdict was found for the plaintiff, damages 5*l*. In Michaelmas term, 1834, Sir *James Scarlett* obtained a rule to set aside the verdict and for a new trial; against which

*Talfourd*, Serjt. and *Phillips*, now shewed cause. The conviction is bad, inasmuch as it imposes one joint fine upon two individuals. A several fine ought to have been imposed upon each. The effect of imposing a joint fine and costs, as in this case, is, that neither of

the parties convicted could get out of prison by paying a moiety of the fine and of the costs, but must either remain in prison until the other has paid his fine, or must pay the whole himself. For this reason the conviction is uncertain, and therefore void. There are cases in which it has been held that one defendant may be convicted of several penalties; but there is no case in which it has been held that two can be convicted in a joint penalty (*a*).

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*Campbell, A. G., and Godson*, in support of the rule. The conviction is good upon the face of it. This was an assault, and each party was liable to be fined in a larger amount than the sum imposed upon the two: there is therefore no excess of jurisdiction. The conviction is in the nature of an indictment, and each is liable to pay the whole penalty and costs. It has been decided with reference to 5 *Ann. c. 14*, that where several are concerned in an offence against that statute, one penalty only can be recovered. In *Rex v. Clark (a)*, Lord *Mansfield* says, "Where the offence is in its nature single, and cannot be severed, there the penalty shall be only single, because though several persons may join in committing it, it still constitutes but one offence; but where the offence is in its nature several, and every person concerned may be separately guilty of it, there each is separately liable to the penalty." In this case, each may be separately guilty of the offence, and there is therefore no excess of jurisdiction in the magistrates adjudging each to pay the whole.

(*a*) *Cowper*, 610. And see 4 T. R. 809; *Rex v. Lovell*, 7 T. R. 152; *Rex v. Swallow*, 8 T. R. 274; *Regina v. Matthews*, 10 Mod. 26; *Crepps v. Durden*, N. P. C. 123; *Holland v. Duffin*, Cowp. 640; *Brooke v. Milliken*, 3 T. R. 509; *Rex v. Bliardale*, Peake, N. P. C. 58.

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LORD DENMAN, C. J.—The plaintiff has sued the defendants for sending him to prison; and the defendants justify imprisoning the plaintiff upon a conviction under 9 Geo. 4, c. 31; and unless that conviction be invalid, the defendants were justified in what they did. It appears to me that the conviction is bad. It is unnecessary to consider the other objections which have been urged against the conviction, as we all agree that the objection that the conviction is bad for awarding a joint fine, to be paid by these two individuals, is fatal. The utmost that can be said in favour of the conviction is, that it is *obscure*. It is ambiguous whether each party is to be charged by the payment of 4s. or 2s.; and that ambiguity is alone sufficient to render the conviction invalid. The offence complained of in this case was a separate offence in each of the offenders, and the conduct of each party should be subject to the separate consideration of the magistrates. The guilt of one party may exceed that of the others; yet, upon a conviction such as this, the one who is the least guilty may have to pay the whole fine before he can be released from prison. That inconvenience cannot be avoided, unless each has a distinct notice of the sum to be paid by him. It is laid down in *Hawkins*, that where there are several defendants, a joint award of one fine against them all is erroneous; for it ought to be severed against each defendant, otherwise one who hath paid his proportionable part might be continued in prison till all the others have also paid theirs, which would be in effect to punish him for the offence of another; and for this *Hawkins* refers to a case in 11 Co. Rep. 43(a).

LITLEDAL, J.—All trespasses which several per-

(a) *Godfrey's case*; S. C. per Rep. 32, 73. And see *Anon.*  
*nomen Buller v. Godfrey*, 1 Roll. Dyer, 211 b, pl. 81.

sons join in committing, are, in law, both joint and several. Mrs. Yapp might have brought a joint action or several actions against those who assaulted her, or she might have indicted them. She adopts, however, the course of proceeding against them before the magistrates in a summary way, under 9 G. 4, c. 31. These parties then being brought before the magistrates, they consider the case, and adjudge that the sum of 4s. shall be paid. It is not quite clear whether *each* was to pay 4s.; but I take it that the meaning of the magistrates was, that only *one* fine of 4s. should be paid. The question then is, whether a joint fine can be imposed upon the two parties? In the case of an *indictment* a joint fine cannot be imposed. It is every day's experience in this Court, that where a fine is intended to be imposed upon several individuals, the case of each is considered separately. This conviction is similar to a proceeding by indictment, for which it is substituted; and the case of each individual ought to have been considered separately. I find, upon inquiry of the officers of the Court, that there is no instance in this Court of a joint fine being imposed upon two persons. If we consider the nature of the offence and the authorities, it is clearly illegal. *Hawkins* lays it down that a joint fine is erroneous, and he refers to *Godfrey's* case. In that case a joint fine had been imposed upon several jurors of the court-leet; and it was held that it was not lawfully imposed, and that it ought to have been assessed upon them separately. Several other cases are mentioned, in which it was held that a joint fine is unlawful; and many other authorities are referred to in the margin. This result may be collected from the whole, that where a fine is imposed on two, it ought to be imposed *severally*. In the present case, as the fine was imposed *jointly*, it is unlawful. Suppose one to have paid his portion of the fine, it

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would be unreasonable to keep him in prison till the other had also paid his portion. This conviction is therefore bad, not in point of form, but in point of substance.

WILLIAMS, J.—This is a matter affecting the merits. If we are to consider that one fine of 4s. was imposed upon the two, then if one was willing to pay his share, he ought to be discharged; but according to the terms of the conviction, he would be detained until the whole was paid. For this reason I agree with the rest of the Court.

Rule discharged (a).

(a) *Coleridge, J.*, was absent on account of a domestic affliction.

### The KING v. The Inhabitants of WHISTON.

No settlement is acquired by service under an indenture of apprenticeship ordered, made, and allowed under 56 Geo. 3, c. 139, unless the notice required by section 2 was duly given and was proved to the justices before allowance.

But where an indenture, whereby the overseer of A. bound a pauper apprentice to a master in B., under that statute, appears on the face of it to have been made in pursuance of an order of justices, and to have been allowed by them, it will be presumed, until the contrary be shewn, that such notice had been duly given and was proved to the magistrates before allowance.

ON appeal, an order of two justices, whereby *Thomas May*, his wife and children, were removed from the parish of St. Mary, in the town of Nottingham, to the township of Whiston, in the West Riding of the county of York, was confirmed, subject to the following case:

The pauper, a poor boy of, and legally settled in, the township of Dinnington, in the West Riding, was, in December, 1818, pursuant to an order of two justices of the said Riding, bound apprentice by the churchwardens and overseers of the poor of Dennington, to *James Herring*, residing within the said township of

Whiston, by indenture, duly signed and allowed, for a term therein mentioned, and served the said *James Her-ring* under the said indenture for more than forty days in the said township of Whiston. Dinnington is about five miles from Whiston. Each township maintains its own poor separately, and both townships are within the same county, and within the jurisdiction of the two magistrates who made the order for binding, and who afterwards signed their allowance of the indenture.

On the hearing of the appeal at the quarter sessions for the town and county of the town of Nottingham, the respondents refused to call evidence to prove that notice had been given by the overseers of Dinnington to the overseers of Whiston, of their intention to bind out such apprentice, no evidence having been offered by the appellants to prove that such notice was *not* given.

The question for the opinion of the Court is, whether the respondents were bound to prove that notice &c. had been given.

*Whitehurst*, (with whom was *M. D. Hill*), in support of the order of sessions. Even assuming that no notice was in point of fact given, yet a settlement was gained under 56 *Geo. 3*, c. 139. By sect. 5 it is enacted, "that no settlement shall be gained by any child who shall be bound by the officers of any parish &c., by reason of such apprenticeship, unless *such order* shall be made, and *such allowances* of such indentures of apprenticeship shall be signed as hereinbefore directed." "*Such order*" and "*such allowance*" do not mean an order and allowance supported by all the previous steps required by the statute, but an order and allowance, in themselves such as the act requires. Sect. 1 enacts, that before any child is bound apprentice by overseers of the poor, such child shall be carried before two justices, who are to

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make certain inquiries, as there directed, and if they think it proper that the child should be bound to the proposed master, they are to make an order, authorizing the binding accordingly; and such order is to be referred to by the date thereof and the names of the said justices, in the indenture of apprenticeship of such child; and after such order shall have been made, such justices are to sign their allowance of such indenture of apprenticeship, before the same shall have been executed by any of the parties thereto. Sect. 2 requires that notice shall be given to the overseers of the parish or place in which such child shall be intended to serve an apprenticeship, before any justice of the peace for the county or district shall allow such indenture, and such notice shall be proved before such justices shall sign such indenture, unless one of such overseers shall attend such justice and admit such notice. Sect. 6 imposes a penalty of 10*l*. on overseers who shall bind an apprentice without having obtained *such order and such allowances* as thereinbefore required, and on any person who shall receive any such apprentice as so bound, without *such order and allowances* having been first obtained. "Such order" and "such allowances," as used in this section, must mean the same thing as the similar expressions in sect. 5. The legislature cannot have intended to impose a *penalty* on the master by fine, and on the apprentice by declaring that he shall gain no settlement by reason of his apprenticeship, because the *justices* had improperly signed an allowance of the indenture, without proof or admission of the notice required by sect. 2. The presence of the master and apprentice at the time of making the order and allowances is not required; indeed the master, if not also the apprentice, may know nothing of the proceedings until after the indenture is executed. It must have been intended to be sufficient as regards the

rights and liabilities of the apprentice and master, that an order and an allowance or allowances should appear to have been made by persons of competent jurisdiction.

Supposing, however, the notice to be requisite, it is not incumbent on the party supporting the indenture to give evidence of such notice, until some *prima facie* case of want of notice has been made out by the opposite party. The justices are empowered to allow indentures of apprenticeship only after proof or admission of notice to the overseers of the parish in which it is intended that the apprentice shall serve; and where a question as to the validity of the allowance arises in a collateral matter, the Court are bound to presume that the justices did their duty in respect of all necessary preliminaries.

He was stopped by the Court.

*Milner*, *contra*. In *Rex v. Threlkeld* (a) it was distinctly held, that the want of the notice required by sect. 2 of 56 Geo. 3, c. 139, was fatal to the claim of a settlement under the apprenticeship. [Lord Denman, C. J. You may go on to the point as to the presumption in favour of the justices having acted rightly.]

*Rex v. Threlkeld* shews decisively that the notice is necessary, in order to the giving of a settlement by apprenticeship, under 56 Geo. 3, c. 139. If so, it was necessarily a part of the respondents' case, and should have been proved by them affirmatively. This case falls, it is submitted, within the general rule, that the onus probandi lies on the party who asserts the affirmative.

It seems impossible, in such a case as this, for the appellants to give negative evidence,—as it is contended on the other side that they are bound to do,—of the absence of due notice. The respondents, by whom the supposed settlement by service under this indenture is


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(a) 1 Nev. & Mann. 14; 4 Barn. & Adol. 229; 1 Nev. & Mann. Mag. Ca. 3.

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set up, must be peculiarly cognizant of all the circumstances which would facilitate the ascertaining whether notice had or had not been duly given. The appellants may not know the date of the indenture, nor by the overseers of what parish it was made, and may therefore have to institute inquiries in many parishes, and to examine many succeeding overseers; difficulties which the respondent parish would not have to contend with.

LORD DENMAN, C. J.—It appears to me that this is a very clear case, and one which is to be decided on the broad principle, that an order of justices, good upon the face of it, shall be presumed to be so altogether, until such presumption is rebutted by evidence to the contrary. I accede to the proposition that we cannot call for negative evidence until the affirmative is *primâ facie* established. Here, however, the affirmative is shewn. Here is an order by persons on whom a public duty is cast by act of parliament, and we must presume that they have proceeded rightly until the contrary is shewn. There is a strong *primâ facie* case in favour of the respondents, and the appellants have given no answer to it.

LITLEDALE, J. concurred.

WILLIAMS, J.—The act of parliament says most strongly, that notice shall be given before any justice shall allow the indenture, and that such notice shall be proved before such justice shall sign such indenture. It is *primâ facie* to be taken that the justices who signed this indenture, had due proof of notice before they did so.

COLERIDGE, J.—It is a general rule that when :

officer has a duty to perform, it must be pre-  
 until the contrary appear, that he has performed  
 y. It is said that by requiring the appellant to  
 e absence of notice, we shall be throwing the  
 of proof upon the party with whom the negative  
 t this is not properly so. We call upon them to  
 nter evidence to rebut a presumption. In *Rex*  
*ngfield(a)*, in which the question was, whether  
 rd of certain commissioners for inclosing lands  
 e received in evidence, without proof that the  
 required by the Inclosure Act to be given pre-  
 to making the award, had been given,—Lord  
*rough* states the general rule certainly to be,  
 ere a person is required to do an act, the not  
 which would be a criminal neglect of duty, it  
 intended that he has duly performed it, unless  
 rary be shewn; but as in that case there was  
 evidence, it was held that such presumption  
 atted.

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*faule & Selw.* 558.  
 ere the law presumes  
 ative, the party relying  
 negative must prove  
 here an act is required  
 , the omission of which  
 a criminal neglect of  
*nke v. Butler*, 1 Roll.  
*Rex v. Combs*, Com-  
*Lord Halifax's case*,  
 2. 298 a, and 12 Vin.  
*Williams v. East India*

*Company*, 3 East, 192; *Rex v.*  
*Hawkins*, 10 East, 211; *Bennett*  
*v. Clough*, 1 Barn. & Alders.  
 461, 463; *Smith v. Huson*, 1  
*Phillimore*, 287; *Rex v. Hube*,  
*Peake*, N. P. C. 131; *Calder v.*  
*Rutherford*, 3 Brod. & Bingh.  
 302, 7 B. Moore, 158; *Doe d.*  
*James v. Price*, 1 Mann. & Ryl.  
 683; *Rex v. Leuke*, ante, i. 544;  
*Vinn. Sel. Jur. Quæstion. lib. 2,*  
*cap. 12.*

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## BATCHELOR v. HODGES.

In a declaration against an overseer &c. for the penalty imposed by 17 Geo. 2, c. 3, for refusing inspection of a poor-rate, it is sufficient for the plaintiff to describe himself as an inhabitant of the parish, without stating that he is a rated inhabitant.

In such a declaration against an assistant overseer, it is sufficient to charge that the defendant had the rate in his possession as such assistant overseer, without expressly stating that the defendant was such an assistant overseer as made it his duty to produce it, *semble*.

At all events, the omission of such statement could only be taken advantage of on special demurrer.

To such a declaration it is no plea that the rate, at the time of the demand of inspection, was not a *subsisting* rate.

Still less that it was an old rate unappealed against, and the time for appealing against which had expired.

**DEBT**, on 17 Geo. 2, c. 3. The declaration stated that the plaintiff was an inhabitant of the parish of New Windsor, and that the defendant was assistant overseer of the poor of that parish; that the churchwardens and overseers had, on 10th July, 1834, made a rate for the relief of the poor, which was afterwards duly allowed and published, and that afterwards, and at a reasonable time in that behalf, to wit, on 4th February, 1835, the plaintiff requested the defendant, as such assistant overseer, to permit him to inspect the rate, and tendered the defendant 1s. for the same; and although the defendant, as such assistant overseer, had the rate in his possession, yet he would not permit the plaintiff to inspect it, but neglected and refused, contrary to the form of the statute, and thereby the defendant forfeited 20*l.*: Whereby &c. Plea: first, *nunquam indebitatus*; secondly, that at the time when the plaintiff requested &c. he had no right to inspect the rate, the same not being a *subsisting* rate for the relief of the poor of the said parish, or such a rate as the plaintiff was entitled to inspect: Verification. Thirdly, that the rate was an old rate, made for the relief of the poor of the said parish, to wit, on 10th July, 1834, and duly allowed and published on 13th July, 1834; that the time for appealing against such rate, and questioning the validity of it, had expired long before the demand of inspection, and that no appeal had been made against such rate, nor had any notice of appeal, or of any intention to question the validity of the rate, been given by the plaintiff before or at the time when he re-

requested the defendant to permit him to inspect; wherefore he did not permit &c. The 4th plea shewed that the plaintiff had had an opportunity of appealing, but that no appeal had been entered or notice given. The plaintiff demurred generally to the 2d, 3d, and 4th pleas. Joinder in demurrer.

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*Curwood*, in support of the demurrers. The pleas are clearly bad. The right of an inhabitant to inspect is general, and not limited to the rate *last* made, which seems to be what is meant by "*subsisting* rate" in the 2d plea, nor to those rates, the validity of which he has still the power of questioning. Insufficiency of pleas.

*Channell*, *contra*. The second plea is good. The party can have no right to inspect any but a *subsisting* rate, or one which the parish officers intend to enforce. It may be that the rate has been quashed. [Lord *Dennan*, C. J. A plea that the rate which the plaintiff demanded to inspect was not a subsisting rate, cannot mean any thing of that sort. Is this such an allegation that we can take notice of what it means?] Sufficiency of pleas.

(*Channell* abandoned the pleas.)

The *declaration* is bad on the grounds that it does not sufficiently appear that the plaintiff is a party *aggrieved*, nor that the defendant, as assistant overseer, is invested with such a character as to be liable to the penalties of the statute. Insufficiency of declaration.

It should have appeared that the plaintiff was a *rated* inhabitant, in which case it would be presumed that a refusal to permit him to inspect the rate was a grievance; or it should have been distinctly stated that the plaintiff was *aggrieved* by the refusal. Sect. 3 of 17 *Geo.* 2, c. 3, gives the penalty for refusal "to the party *aggrieved*;" First objection: Non-allegation of being rated inhabitant.

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and in *Spenceley v. Robinson* (a) it was held, that in order to entitle a party to sue for the penalty, he must shew that he has sustained an *injury* by the act of the overseer. *Bennett v. Edwards* (b), in which *Spenceley v. Robinson* was cited, appears at first sight to over-rule that case. It certainly does not *expressly* over-rule it, and there is this distinction between the two cases, that in *Bennett v. Edwards* it was proved at the trial that the plaintiff was a *rated* inhabitant, and it was decided that a refusal to allow a *rated* inhabitant to inspect the rates, made such inhabitant a party aggrieved. *Bayley, J.* says, "I think the plaintiff was the party aggrieved. Here, the plaintiff had a right to see the rate, in order to satisfy himself whether he was fairly dealt with, and whether other parties were assessed at all, or to the full value, or whether he was over-rated; and this inspection was wrongfully denied him:"—all which reasons would by no means apply to the case of a party who did not appear to have been a rated inhabitant.

Second objection:  
 Omission to shew that the defendant was a party liable.

The declaration is also defective in that it does not sufficiently appear that the defendant was a party liable to the penalties of this statute. Sect. 2 of 17 Geo. 2, c. 3, imposes the duty of permitting inspection of poor-rates upon "the churchwardens and overseers, or other persons authorized to take care of the poor in every parish, township, or place." This defendant is not stated to be a churchwarden or overseer, nor does it follow from his being, as alleged, an *assistant overseer*, that he was a person authorized to take care of the poor. This point was raised in several stages of the case of *Bennett v. Edwards*. On the first trial it appeared that the defendant was an *assistant overseer*, but it was

(a) 5 Dowl. & Ryl. 572; 3 Barn. & Cressw. 658; 3 Dowl. & Ryl. Mag. Ca. 551.

(b) 1 Mann. & Ryl. 482; 7 Barn. & Cressw. 586; 1 Mann. & Ryl. Mag. Ca. 184.

not shewn by production of his appointment, or otherwise, what was the nature of the duties which, as such, he had to perform; and on this ground the Court sent the case down for a new trial. *Holroyd, J.* there said, "The law knows what an overseer is, but it does not know what is an *assistant overseer*. He may be appointed generally to do all the business of an overseer, as a deputy, or only to keep the accounts or perform other particular business. If it were his duty to do all the acts which an overseer is bound to do, then he ought to have produced the rate. A jury must decide this, by ascertaining the nature of his duty." Upon the second trial (a), a verdict was found for the plaintiff, and a motion was made in arrest of judgment, on the ground that it was not averred in the declaration that it was the *duty* of the defendant, as assistant overseer, to exhibit the rate to the plaintiff when requested. The Court certainly held that the allegation, (which is also found in the declaration in the principal case,) that the defendant had the rates in his possession, as assistant overseer, was sufficient to ground a presumption, *after verdict*, that the defendant was proved to be *such* an assistant overseer as made it his *duty* to produce the rate to the plaintiff; but even there the Court considered that there was only just sufficient on the record to turn the scale against the defendant. It is not intended to deny that the declaration in the present case would be good *after verdict*, but it is submitted that the objection must be fatal upon *demurrer*. In *Edwards v. Bennett* (in error) (b), in which the same question was raised upon the argument of a writ of error, the Court of Exchequer Chamber held the declaration good *after verdict*, but the reasoning upon which they founded their decision is remarkable, and

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(a) 8 Barn. & Cressw. 702. Payne, 749; 3 Younge & Jerv.

(b) 2 Mann. & Ryl. Mag. Ca. 458.  
189; 6 Bingham. 230; 3 Moore &

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favours the argument that *upon demurrer* it would have been bad. Indeed, *Tindal*, C. J., in delivering the judgment expressly says, "Had the objection been made in demurrer, it must have prevailed."

First objection.

*Curwood*, in reply. The language of the act of parliament is quite clear, with respect to the first point. The enactment is, "that the churchwardens &c. shall permit *all and every the inhabitants* of the said parish &c. to inspect &c.;" and it may be that the party is aggrieved by reason of his *not* being rated. The right of voting at the election of members of parliament, or of corporate officers, may have depended upon his being rated.

Second objection.

It is admitted upon the record that the defendant was the person who had the possession of the rates, therefore he was the person to whom to apply for inspection. The cases referred to only shew that a declaration such as the present is good after verdict, without shewing that upon demurrer it is bad. This case seems too clear for further argument.

First objection.

LORD DENMAN, C. J.—It appears to me that this declaration is perfectly good. The decision of the Court in *Spenceley v. Robinson* introduced, in effect, a new term into the act of parliament. This must be taken to have been dropped by general consent in the late case, in which the declaration was held good, although, as in *Spenceley v. Robinson*, it did not state that the plaintiff was a *rated* inhabitant, nor that he was aggrieved by the refusal of inspection. The fact of the plaintiff's not being upon the rate, I think immaterial.

Second objection.

Then upon the second point we have been referred to *Bennett v. Edwards*, in which it was said that an assistant overseer was not a person who, as a matter of course, was authorized to take care of the rates; and to

*Edwards v. Bennett* (in error), in which the Lord Chief Justice of the Common Pleas said, that the objection to the declaration on that ground must have prevailed on demurrer. He may possibly have meant *on special demurrer*. I cannot think that, at all events, it is *more* than that. It seems to me to be impossible to bring any person more distinctly within the purview of the act of parliament than this defendant, who, it appears, was assistant overseer, and as such had custody of the rates. A refusal to produce the rate by the party thus possessing the means of withholding it, is the very mischief which the statute was intended to remedy.

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LITLEDALE, J.—The second point appears to me to be decided by *Bennett v. Edwards*. Second objection.

With respect to the other point:—The plaintiff is within the *words* of the act of parliament, inasmuch as he is “an inhabitant.” He may have an interest in seeing the rate, although not himself rated. He may desire to see whether he is rated or not, as there are some privileges connected with the being rated. The act of parliament says nothing about “*rated* inhabitants:”—We have no right, therefore, to say that it is necessary that he should appear to be such. First objection.

WILLIAMS, J.—I am of the same opinion. We have no right to import a term into the act of parliament. First objection. If the legislature had intended that none but rated inhabitants should have the right of inspection, the enactment should have been so expressed. If the plaintiff, as an inhabitant, had a right to inspect, and inspection was refused, he was a party aggrieved within the meaning of the act.

With respect to the other point:—Here it appears, on the face of the declaration, that the defendant was Second objection.

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assistant overseer, and as such had the possession of the rate, and this, I think, brings him within the language of the act, which is very general.

COLERIDGE, J.—I think that Mr. *Channell* is quite right in giving up the second plea, as well as the others. There can be no doubt that, under this act of 17 *Geo.* 2, c. 3, and 17 *Geo.* 2, c. 38, the rule applies equally as well to old rates as to modern rates. The overseers are bound by the 13th section of the latter act to keep a book, wherein to enter attested copies of all rates and assessments; which book is to be carefully preserved in some public place, whereto all persons assessed or liable to be assessed may freely resort.

First objection  
to declaration.

There are two objections to the declaration. With respect to the first, we must look at the words of the statute. It would be extraordinary if a declaration in the words of the statute were held not to be good upon the face of it. Here it is in the words of the statute.

Second objec-  
tion.

As to the second objection:—We must look at the sections which give the right of inspection and impose the penalty. There are three sets of persons liable—churchwardens, overseers, or other persons authorized as aforesaid,—i. e. (by reference to the 1st section,) “authorized to take care of the poor.” The very term “assistant overseer” of itself imports that he is a person “authorized to take care of the poor.”

Judgment for the plaintiff.



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The KING v. The Inhabitants of the District of EDGE LANE, in the Township of ROYTON, in the County of LANCASTER.

**INDICTMENT** for not repairing part of a highway, leading from the township of Oldham, past or near Drycough in the township of Royton, towards and into the township of Crompton, the said part being situate in the district of Edge Lane in the township of Royton, in the parish of Prestwick-cum-Oldham, commencing at a certain ancient highway there leading from Oldham to Rochdale, and extending from thence towards Crompton aforesaid, containing in length 1091 and in breadth 12 yards.

At the trial before *Gurney, B.* at the Lancaster spring assizes 1833, a verdict was found for the crown, subject to the following case:

The part of the road for the non-repair of which the indictment was found, is within the district of Edge Lane. This district has always repaired the highways within it which would otherwise be reparable by the parish at large.

The road indicted was made under 45 *Geo. 3, c. vii*, intituled "An act for making and maintaining a road from *Hollinwood* in the township of Chadderton, to *Featherstall* in the township of Hundersfield, in the county palatine of Lancaster, and for making and maintainung several branches of road to communicate therewith." This act was repealed by 7 & 8 *Geo. 4, c. lv.* intituled "An act for making and maintaining a road from *Hollin-*

Where, by an act of parliament, trustees are authorized to make a main line of road from one point to another, and a portion only of the road is completed, the district through which the part completed is situate, is not bound to repair it, although made by the trustees, —and used by the public, and repaired by the district, for upwards of thirty years, and although it be of great utility to the public.

Nor does it make any difference that the line of road has been in some measure varied by subsequent acts of parliament, and the completed

parts made the subject of distinct enactments with respect to repairs and tolls to be done and taken by the trustees; the object of all the acts being to make a communication between the same districts.

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wood to *Littleborough* (a), and other roads communicating therewith in the county of Lancaster." The latter act contains a clause that it shall be put in execution for the purpose (amongst others) of amending, widening, diverting, altering, repairing, improving, and keeping in repair the roads leading from *Dryclough* through *Shaw*, *New Hey*, and *Milnrow*, to *Rochdale*. The 7 & 8 Geo. 4, c. lv. was repealed by 11 Geo. 4, c. xcii. intituled "An Act for improving and maintaining the Road from *Werneth* (b) to *Littleborough*, and other Roads communicating therewith in the county of Lancaster:" whereby it is declared, that it shall be put in execution for the purpose of (amongst other things) improving, repairing, amending, widening, diverting, altering, and keeping in repair the roads leading from Werneth by Coppice Nook and Westwood, to Uin Nook, and for making, maintaining, and keeping in repair the proposed new line of road from Uin Nook in Oldham, to *Dryclough* in Royton; and also for improving and repairing the road leading from *Dryclough* through *Shaw* to *New Hey*; and for making, maintaining, and keeping in repair the proposed new line of road from the then turnpike road at New Hey to or near to Littleborough, by the said recited act authorized to be made; and also for improving, repairing, amending, widening, diverting, altering, and keeping in repair the branch road leading from New Hey through Milnrow to Rochdale, and also the branch of the road from Goats to Grains in Crompton; and also the branch road leading from Bent Green to Middleton.

(a) It appeared by the plan referred to *post*, 83, that the line of road from Hollinwood to Littleborough varied but slightly from the line from Hollinwood to Featherstall, for which it was substituted.

(b) The road from Werneth (substituted by this act for Hollinwood as one terminus) to Littleborough, appeared by the plan to be substantially the same road as that from H. to L.

Many of these new lines of road and the branch roads are still unfinished (*a*), but some have been finished. The road now in question is part of that mentioned in the 7 & 8 Geo. 4, as leading from Dryclough through Shaw, New Hey and Milnrow, to Rochdale, and also of the road mentioned in the 11 Geo. 4, as leading from Dryclough through Shaw to New Hey. The whole of this line of road was properly made and completed in 1806, from which time hitherto it has constantly been travelled over and used as a public road between Dryclough and New Hey, at both of which places it joins other lines of public roads. Houses and cotton mills have been erected at the sides of it, and during the whole of this period, until the middle of 1832, the necessary repairs have been done to it by the respective parishes, through which the road passes; and this road forms a communication between the several places through which it passes and the public roads at Dryclough, Shaw, New Hey, and Rochdale. The want of repair, as stated in the indictment, is admitted by the defendants.

The indictment, and the several acts of parliament mentioned in the case, and a plan agreed to by both parties, may be referred to and used as part of the case (*b*).

*Wightman* (with whom were Sir *F. Pollock* and *Laurence Peel*) for the prosecution. Several different lines of road are projected to be made under various acts of parliament, and the question for the consideration of the Court is, whether the districts liable to the repair of

(*a*) It appeared by the plan that the communication between Werneth and Littleborough was incomplete, by reason of a portion of the line of road at each end (amounting to nearly half the distance) not having been

made.

(*b*) Portions of the acts not mentioned in the case will be found stated in the arguments, and the plan is referred to *ante*, § 28, notes (*a*) and (*b*), and *supra* (*a*).

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those lines of road that are completed, are to be compelled to continue to repair them, notwithstanding all the projected lines of road may not have been finished. The road in question is part of the road leading from Dryclough through Shaw and New Hey to Rochdale. It was made by virtue of 45 Geo. 3, c. vii., which was an act for making and maintaining a road from Hollinwood to Featherstall, in Lancashire. It was subsequently found that this road was not sufficient for the district, and therefore an act was passed in the 7 & 8 Geo. 4, for making a road from Hollinwood to Littleborough. This act (7 & 8 Geo. 4, c. lv.) recites, that great part of the road from Hollinwood to Featherstall, and of the several branches to communicate therewith, and other parts thereof, had not been made, and that it would be of great public utility if powers were granted to make a variation in the line prescribed by the said acts of certain parts of the said roads which had not been so made and completed. Certain variations are then pointed out. The first section then enacts, that the act shall be put in execution for the term of 21 years for the purpose of *amending and keeping in repair the roads* leading from Dryclough through Shaw, New Hey, and Milnrow, to Rochdale, which includes the road indicted, and *for making and keeping in repair the proposed new line* of road from, at, or nearly opposite the Waggon and Horses, situate at the bottom of Hollinwood, to the turnpike road at Dryclough, and also the proposed *new line* of road from the turnpike road at New Hey, and also for amending and repairing another road (which is mentioned) and a branch therefrom. This act therefore recognizes the road in question, viz. the road from Dryclough through Shaw, New Hey, and Milnrow, to Rochdale, as a separate and distinct line of road. Subsequently it was thought that it would be useful to the public to alter the

lines of road and make other lines, and section 1 of 11 Geo. 4, c. xcii. provides, that the act shall be put in execution for the term therein mentioned, for the purpose of improving and keeping in repair the roads leading from Werneth by Coppice Nook and Westwood to Uin Nook, and for making, maintaining, and keeping in repair the proposed new line of road from Uin Nook in Oldham, to Dryclough in Royton aforesaid; and also for improving, repairing, amending, widening, diverting, altering, and keeping in repair the road leading from Dryclough through Shaw to New Hey, and for making, maintaining, and keeping in repair the proposed new line of road from the turnpike road at New Hey to or near Littleborough, by the said recited act authorized to be made; and also for improving, repairing, amending, widening, diverting, altering, and keeping in repair the branch road leading from New Hey through Milnrow, to Rochdale, in the said county, and also the branch of road from, at, or near Goats in Crompton, to Grains in Crompton, and also the branch road leading from Bent Green to Middleton. A clause provides, that certain sums may be taken for tolls at all or any of the roads thereinbefore mentioned, save and except the proposed road from Werneth to Dryclough. There is subsequently a provision for the taking of toll on the proposed road from Werneth to Dryclough. There is also a clause for limiting the number of payments on each line of road; the words are as follow: "At no more than one gate on the *whole line* of road from Werneth to Dryclough, and at no more than one gate on the *whole line* of road from Dryclough to Shaw, and at no more than two gates on the *whole line* of road from Shaw to Littleborough, and at no more than two gates on the *whole line* of road from Shaw to Rochdale, and at no more than one gate on the *whole line* of road from Goats to

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Grains, and at no more than one gate on the whole line of road from Bent Green to Middleton." These acts of parliament recognize the several roads as separate and distinct, and treat the road in question as a separate line of road. This question has arisen in consequence of *Rex v. Inhabitants of Cumberworth* (a). There, a single road was directed to be made from A. to B., and it was held that the making of the entire road was a condition precedent, and that the public were not liable to repair the road until the whole had been completed. But in that case there was only one line of road, and that was incomplete; whereas here the acts of parliament disclose a general scheme consisting of several lines of road, and the road indicted is part of a distinct line of road that is completed. *Rex v. Cumberworth* was decided on a case of *Rex v. Hepworth* (b), and Lord Tenterden said, that if there had been no decision on the subject he should have entertained some doubt. If the road be a public road (and it is submitted that the acts declare it to be a public road) all the incidents of a public road follow, and the public are liable to repair it. *Rex v. Netherthong* (c) decided, that the public were bound to repair a road, notwithstanding that a local turnpike act empowered the trustees under it to take tolls and directed that the roads should from time to time be repaired by the trustees out of the money arising by virtue of the act. But this case is also distinguishable from those referred to, by reason of the repairs which have been made. The road has been travelled over and used by the public ever since 1806, and it has likewise been repaired by the districts during that period. There has, therefore, been a dedication to the public and an acquiescence on the part of the defendants in that dedication, if that be considered neces-

(a) 3 Barn. & Adol. 103. argument.

(b) 3 Barn. & Adol. 110, in (c) 2 Barn. & Ald. 179.

sary, according to the case of *Rex v. St. Benedict* (a). [Lord Denman, C. J. That case may now be considered as over-ruled.] It may now be considered as settled that adoption by the inhabitants of the district is not essential to constitute a public road, *Rex v. Leake* (b). Should it be said that the defendants repaired under a mistaken notion of their liability, that will not avail them, since, according to *Rex v. Haslingfield* (c), it is only an ignorance of facts and not of law which forms an excuse. *Rex v. Justices of the West Riding of Yorkshire* (d) is distinguishable. That case turned upon the insertion in the act of parliament of the word "respectively;" which does not occur in the acts of parliament relative to the present case.

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*Blackburn*, for the defendants. The defendants are not bound to repair the roads until the whole line is completely finished. This cannot in strictness be considered as a public road under the act of parliament, unless the requisitions of the act have been complied with. The intention of the legislature was, that the *whole* road from Werneth to Littleborough should be completed, and that intention may be collected from the several acts of parliament relating to this case. The first act, which is for making a road from Hollinwood to Featherstall, recites that the making of such a road, with a branch to Middleton within Oldham, a second branch to Grains in Oldham, and a third branch to Rochdale, would be a

(a) 4 Barn. & Ald. 447.

(b) *Ante*, i. 544.

(c) 2 Maule & Selw. 558. And see *Gomery v. Bond*, 3 M. & S. 378; *Brisbane v. Dacres*, 5 Taunt. 143; *Hornbuckle v. Hornbury*, 2 Stark. N. P. C. 177; *East India Company v. Tritton*, 3 Barn. & Cressw. 280, 290; 5 Dowl. &

Ryl. 214; 2 Nev. & Mann. 304

(a); *Vernon's case*, M. 20 Hen. 7, fol. 2 b, pl. 4; *Rouse v. Redwood*, 1 Esp. N. P. C. 155; *Chatfield v. Paston*, Chitty on Bills, 304, 7th ed.

(d) 3 Nev. & Mann. 86; 5 Barn. & Adol. 1003; 2 Nev. & Mann. Mag. Ca. 433.

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great benefit and advantage to the inhabitants of the adjacent country, and would open a much shorter and better communication than there is at present between the towns of *Oldham* and *Todmorden*, and the very populous and manufacturing country in and near *Middleton*, *Oldham*, *Shaw*, *Chapel*, and *Butterworth*, and the towns and places adjacent thereto, and between various other parts of the country, and would also be of great public utility." It is manifest from the recital in this act, that the inducement to the legislature to make these enactments was the greater facility which the public would thereby have of travelling between *Oldham* and *Todmorden* and the adjacent country. It might be that the making of a road from *Dryclough* through *Shaw* to *New Hey*, would be of little utility; but that the making of a road extending a few miles farther would be of great public advantage. The 7 & 8 *Geo. 4*, c. lv. varied the line in a trifling degree, making the road to commence at *Hollinwood* and cease at *Littleborough*; but the line proceeds through the same tract of country. The 11 *Geo. 4*, c. xcii. directs that the road should commence at *Werneth* instead of *Hollinwood*, but the line of road still proceeds through the same tract. The object which the legislature therefore had in view in passing all these acts was the same,—to open a line of road between the towns of *Oldham* and *Todmorden* and the adjacent populous districts. It is a principle of law that an authority which enables individuals to take away the lands and estates of others against their will must be *strictly* pursued; *Rex v. Croke*(a), *Rex v. Hepworth*, and *Rex v. Cumberworth*. Acts of parliament of this description are treated as forming a contract between the persons to whom the power is delegated and the public. They are so treated in *Blakemore v. The Glamorganshire Canal Navigation* (b), where Lord

(a) Cowper, 26.

(b) 1 Mylne & Keen, 154.

*Adon* thus expresses himself (a):—"Such acts of parliament have now become extremely numerous, and from their number and operation they so much affect individuals, that I apprehend those who come for them to parliament do in effect undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else; that they shall do and shall forbear all that they are required to do and to forbear, as well with reference to the interests of the public as with reference to the interests of individuals." It is on this doctrine that *Rex v. Cumberworth* was decided in this Court. In that case, trustees were empowered to make a road 12 miles in length, from A.

B. They had completed 11½ miles of the road—to a point where it was intersected by a public highway. It was held, that the district in which the part so completed lay, was not bound to repair it, because the whole had not been finished. That case was not decided on *Rex Hepworth* alone, but also on another case which was decided about the same time at Lancaster, before *Bayley*. The principle on which *Rex v. Cumberworth* was decided is, that the trustees had not performed that which the legislature had required them to do, before a burthen could be thrown on the districts to repair the road. But it is said, that *Rex v. Cumberworth* is distinguishable, because here there are several lines of road, and not one main line; and the clause in the last act, which limits the number of payments of toll on the roads, has been referred to with a view of shewing that the main road is divided into distinct and separate divisions. But that clause merely describes the places at which toll-gates may be erected. Several clauses in the same act shew that the legislature considered the whole as one main road of road. There is a clause in the act which relates

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to the application of money arising in the road, which speaks of "the road from Werneth to Littleborough." Again, another clause which regulates the charging of the debt previously contracted, also speaks of the said "line of road from Werneth to Littleborough." This is clearly within the very letter of *Rex v. Cumberworth*, because part of the main line of road has not been finished. That case has not been overruled, and it is of very great importance that the law on this subject should not fluctuate from time to time.

*Wightman*, in reply. At the time of the passing of 7 & 8 Geo. 4, c. lv. the road in question had been made. That act, and likewise the subsequent act, is passed for the purpose of keeping in repair the road which had been made, and for making *new* roads. The road had been used by the public, and is treated and recognized by these acts as a public road. It is said that the whole of these roads are to be taken as one great line of road. It may be that the act does treat them as one line of road for certain purposes, but they are likewise treated as separate and distinct lines of road. The question is, whether this is to be considered as a *public* road or not? Can it be said that the original owners will have a right to resume the possession of the soil of the road, though it has been travelled over for thirty years and is useful to the public, and to treat persons passing along it as trespassers? If this be not a public road in what an unfortunate position are the parties who have erected buildings on the sides of the road. It is said that this is within the case of *Rex v. Cumberworth*. If it be so, it is necessary to review the decision in that case. Can it be reasonably contended, that because a hundred yards of a long line of road are not completed, that a parish which has had the benefit of a part of the road

which has been completed—for upwards of thirty years  
—is not to be compelled to repair it?

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Lord DENMAN, C. J. in the course of this term delivered the judgment of the Court as follows:—It appears from the special case, that in 1605 an act passed (45 Geo. 3, c. vii.) “For making and maintaining a road from Hollinwood in the township of Chadderton, to Featherstall in the township of Hundersfield, in the county palatine of Lancaster, and for making and maintaining several branches of roads to communicate therewith.” The principal line of road therefore is by the title of the act described to be from Hollinwood to Featherstall. And in the preamble it is recited, that the said principal line with four branches would be of great benefit and advantage to the inhabitants of the adjacent country, which is described as being—and is well known to be—“very populous and manufacturing,”—Oldham and Todmorden, amongst other places, being specified.

This act was repealed by another, passed in 1826-7, (7 & 8 Geo. 4, c. lv.) which somewhat varied the line at the Hollinwood terminus, and substituted Littleborough for Featherstall as the terminus at the other extremity. The variation, however, in this particular is but trifling, (as appears by the plan forming part of the case,) and the direction of the line to Littleborough leads to the same tract of country as the original one to Featherstall. The second act was repealed by an act of 1890, (11 Geo. 4, c. xcii.) which made Werneth the terminus instead of Hollinwood, but left the rest of the line to Littleborough substantially the same, so far as the question before us is concerned.

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It follows from this short statement, that the original purpose of communication, as expressed in the first act, is continued into the last, which is the existing act.

It further appears, that at each extremity, parts of the road (which together amount to near half of the whole line) have not been made. And the question is, whether this indictment against the inhabitants of Edge Lane, which is situated about the middle of the line, can be supported.

The state of authority upon this question supersedes, in our opinion, the necessity for much discussion. We would observe, however, that the remarks of Lord Eldon in *Blakemore v. The Glamorganshire Canal Navigation* (a), considering his high authority and undoubted caution, have great weight. We also think that where powers are entrusted by the legislature for an avowed and precise object, the pursuit and performance of that object should be rigidly watched. It by no means follows that the act of parliament for making the roads could have been obtained if the communication had been less—and, in consequence, the accommodation to the public less—than that averred and professed by the preamble of the original act. These observations, however, and others of a similar import, are rendered superfluous, because they are expressly the foundation of a judgment of this Court, with the reasons for which we are satisfied, and by which we mean to abide. In *Rex v. Cumberworth* (b), a certain part, and compared with the present a *small* part of the projected road was incomplete; and for that reason an indictment against the inhabitants of Cumberworth, for not repairing a portion of the line, was held not sustainable. We think that in the present case the like consequences should follow.

Judgment for the defendants.

(a) 1 Mylne & Keen, 154.

(b) 3 Barn. & Adol. 108.

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## The KING v. The MARQUESS OF DOWNSHIRE.

**INDICTMENT**, containing twenty-two counts, for obstructing several public highways, pack and prime ways, and footways, in the parish of East-Hampstead, Berks. Plea: not guilty. By particulars (a), which were furnished in pursuance of an order (b) made by *Park, J.*, it appeared that the prosecutor complained only of the obstruction of *seven* highways (of which three were also claimed as pack and prime ways) and two footways.

At the trial before *Park, J.*, at the Reading spring assizes, 1834, it appeared that East-Hampstead is one of the fifteen parishes formerly included within the ancient forest of Windsor, but was exempted from the operation of the general act (c), which passed in 1813, for disafforesting and inclosing all the lands in Windsor Forest. The open lands within the parish of East-Hampstead,

(a) As to the delivery of particulars of nuisances, under an indictment for nuisance, see *Rex v. Curwood*, 5 Nev. & Mann. 369; *ante*, 293.

(b) As to the obtaining of this order, *vide ante*, 293.

(c) 53 Geo. 3. c. 158.

peace,—the said commissioners and justice to have power to confirm and alter the map;—and all roads not set out, or finally ordered and directed to be set out and continued, were to be for ever stopped up and extinguished, and deemed and taken to be part of the lands to be divided and allotted: Provided, that no roads passing through *old inclosures* should be stopped up, diverted, turned, or altered, without an order of two justices: Held, that a road passing partly through old inclosures and partly over lands to be inclosed, was not, nor was any part of it extinguished by reason of its not being mentioned or set out in the map or award, and of the latter part of it being included within a private allotment.

By an order of justices it was stated, that three justices *having particularly viewed* the public roads within the parish of A., thereafter described, *and being satisfied* that they were unnecessary to be continued, did order that such roads should be stopped up and extinguished:—Held, that this order was invalid, inasmuch as it did not appear upon the face of it that the justices were, *upon the view*, satisfied that the roads were unnecessary.

The Court will make the same intendment in favour of an order of justices as in favour of a conviction.

An act for inclosing lands in the parish of A., authorized commissioners to make new roads, and also to direct, turn, alter, or stop up any of the present public roads, as they should think proper;—directed them to prepare and sign a map describing the roads, and to give certain notices therein prescribed, and to hold a meeting for the purpose of hearing objections, in which they were to be assisted by a justice of the

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consisting principally of East-Hampstead Heath, were inclosed under an act passed in 1821 (*a*). Previously to the inclosure there were tracks or roads across the heath, traversing the uninclosed land in various directions, and others in the adjoining inclosed lands which opened upon the common and communicated with the before-mentioned tracks or roads. The roads and footways mentioned in the particulars were found by the jury, upon the question being put to them at the end of the trial, to be *public* highways and footways.

The following is a more particular description of the highways and footways, taken from one of the maps produced at the trial.

#### Highways—

No. 1, (Bond's Lane,) ran entirely through *old* inclosure to East-Hampstead Heath, which it entered at the point of junction with Nos. 2 and 3 and 4.

Nos. 2 and 3 ran entirely over the heath—forming at first but one road, opening into the end of, and forming a continuation of Bond's Lane, and at a little distance diverged.

No. 4 ran entirely over the heath, being a continuation, in another direction, of Bond's Lane.

No. 5 ran entirely over the heath, and opened into the extremity, and formed a kind of continuation of No. 7.

No. 6 ran entirely over the heath, and opened into No. 5.

No. 7 (called "The Road to the North,") ran entirely through *old* inclosed lands, and entered the heath at the point of junction with No. 5.

#### Footways—

No. 8 and No. 9 both ran entirely through *old* inclosed lands.

(a) 1 & 2 Geo. 4, c. 32, (Private Act.)

No. 8 ran from Bond's Lane (No. 1,) to a common called Bowyer's Common.

No. 9 ran across East-Hampstead Park, from "The Road to the North" (No. 7,) to the heath.

No. 7 and No. 9 were included in the order of justices subsequently mentioned. None of the other disputed roads were made the subject of any order of justices.

By the 18th clause of the Local Inclosure Act (a), the commissioners were authorized and required in the first place, before proceeding to make any of the divisions and allotments directed to be made by that act, to set out and appoint all such public *carriage roads and highways* over the lands thereby directed to be divided and allotted, or over any of the old inclosed lands within the said parish, as they should judge necessary, and to divert, alter, turn, or stop up any of the then public or private carriage roads or highways, or footpaths, over any part of the parish, as they should think proper; and the commissioners were directed to ascertain the same by marks and bounds, and prepare and sign a map in which such intended roads should be accurately laid down and described, and cause the same, when so signed, to be deposited with their clerk, for inspection of all persons concerned; and to give notice, in the manner therein directed, of their having so set out such roads and deposited such map and also of the general lines of such intended carriage roads, and to appoint, in and by the same notice, a meeting to be held by the commissioners, as therein directed, to take the same into consideration; and if any person aggrieved by the setting out of such roads should attend at such meeting, and object to the setting out of the same, then the commissioners, together with any justice or justices acting for the division in which East-Hampstead is situate, and not being in-

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(a) 1 & 2 Geo. 4, c. 32. (Private Act.)

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terested, should hear and determine such objection, and the objections of any other such person, to any alteration that the commissioners, with any justice or justices, might in consequence propose to make; and the commissioners, together with such justice or justices, were thereby required to order and finally direct how such carriage roads should be set out, and either to confirm the map or make such alterations therein as the case might require; and all roads, highways, and paths, through and over the said parish, or any part thereof, which should not be set out or finally ordered and directed to be set out or continued as aforesaid, should be for ever stopped up and extinguished, and should be deemed and taken as part of the lands and grounds to be divided and allotted by virtue of that act, and should be divided and allotted accordingly: Proviso, that no roads passing or leading through any of the *old inclosures* within the said parish should be stopped up, diverted, turned, or in any other way altered, without an order for that purpose, under the hands and seals of two justices for Berkshire, not interested in the repair of such roads, in the manner, and subject to the appeal, and giving such notice as is directed by 55 Geo. 3, c. 68.

The commissioners prepared and signed a map in pursuance of the above provision, which set out twenty public roads and various occupation roads, and many footways. In this map, No. 1 (Bond's Lane,) and No. 4 were set out as an *occupation road*, leading to a new public road: the other highways and the footways were not set out, or in any way alluded to. The map was deposited with the clerk of the commissioners, for inspection; due notice of that circumstance was given, and a meeting appointed to take the matter into consideration. At this meeting no one appeared to make any objection, and the map was confirmed.

The land over which the highways Nos. 2, 3, 5 and 6 formerly ran, was included in the allotment made to the Marquess of Downshire, as lord of the manor of East-Hampstead.

23d March, 1827. At a special sessions held at East-Hampstead, the following order was made :

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“ EAST-HAMPSTEAD INCLOSURE.

“ We &c., three justices &c., at a special sessions held by us at &c., on &c., in pursuance of the authority vested in us, in and by an act of parliament made and passed 1 & 2 *Geo.* 4, c. 32, (the Inclosure Act,) intituled &c., and of an act therein recited of 41 *Geo.* 3, c. 109, and of another act of 55 *Geo.* 3, c. 68, intituled &c., *having particularly viewed* the public roads and footways within the said manor and parish of East-Hampstead, hereinafter particularly described, and we not being interested in the repair of the said roads and footway, *and being satisfied* that the highways, bridleways, and footways intended to remain and be the public highways &c., in future within the said parish, are continued or have been set out and properly formed and made safe and convenient, according to the provisions and directions of the first-mentioned act ; and that the roads and footway hereinafter described are unnecessary to be continued, *do order* that the same public roads and footways be stopped up and extinguished, (that is to say,) [then followed a description of three roads, of which one was No. 7, and of the footway No. 9,] so that the same roads and footway may be divided and allotted pursuant to the provisions of the first-mentioned act. Given, &c.”

1st Aug. 1827. The commissioners made their award, to which the map was attached, and which recited that three justices &c., had, at a special sessions held at East-

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Hampstead, on 23d March, 1827, ordered that the several public roads and the footway thereafter described, should be thenceforth stopped up and extinguished. The award then described the roads mentioned in the order. It then recited that those orders had been confirmed at the sessions, and declared that the said several roads should be for ever stopped up and extinguished as public roads, and that the said three several roads should be for ever thereafter for the exclusive use of the persons whose lands should adjoin thereto, on either side thereof, and it then declared that the footway should be for ever extinguished.

The counsel for the prosecution took several objections to the *order*,—and contended that the roads, other than those included in the order, were not extinguished by reason of their not being noticed by the commissioners. Under the direction of the learned judge, the jury found a verdict for the defendant, and his lordship gave the prosecutor leave to move to enter a verdict of guilty upon the various points which had been made.

In Easter term, 1834, *Ludlow*, Serjt. obtained a rule nisi to set aside the verdict entered for the defendant, and enter a verdict of guilty, upon several grounds. Of these the 5th was, that the order of magistrates is bad, because it does not appear upon the face of the order that the justices acted *upon view*,—upon which objection *Rex v. Justices of Worcestershire* (a) was cited; and the 7th was, that the roads were not extinguished by the circumstance of their not being set out in the map or mentioned in the award,—and upon this objection, *Harber v. Rand* (b), *Logan v. Burton* (c), *Thackrah v. Seymour* (d), were referred to.

(a) 8 Barn. & Cressw. 254;  
 S. C. per nomen *Rex v. Rogers*,  
 2 Mann. & Ryl. 289; 1 Mann.  
 & Ryl. Mag. Ca. 461.

(b) 9 Price, 58.

(c) 5 Barn. & Cressw. 513;  
 8 Dowl. & Ryl. 289; 4 Dowl.  
 & Ryl. Mag. Ca. 50.

(d) 1 Crompt. & Mees. 18.  
 And see *White v. Reeves*, 2 B.

The rule was argued in Trinity term, 1835, before Lord Denman, C. J., Littledale, J., Patteson, J., and Williams, J. The argument as to the 5th and 7th points (a), on which alone the Court gave judgment, was as follows.

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*Jervis, R. V. Richards*, and *J. C. Talbot*, shewed cause. No. 7 (highway), and No. 9 (footway), are expressly stopped up by the order of justices, and Nos. 5 and 6 (highway) are virtually stopped up by such order,

Moore, 23; *Logan v. Burton*, 8 Dowl. & Ryl. 280, 5 Barn. & Cressw. 513; 4 Dowl. & Ryl. Mag. Ca. 50.

(a) The following were the other points on which the learned serjeant obtained the rule nisi.

1. The magistrates of the district were not summoned in time previously to the making of the order for stopping up the roads, inasmuch as one was summoned on the 20th to attend a meeting on the 23d, and he was not one of the justices who appeared and signed the order. In support of this objection, he cited *Rex v. Justices of Worcestershire*<sup>\*</sup>, *Rex v. Sheppard*<sup>†</sup>, *Rex v. Justices of Surrey*<sup>‡</sup>, and *Rex v. Justices of Suffolk*. §

2. That the order of magistrates did not sufficiently describe the roads, nor stop them up as being useless; and he referred to the schedule of 55 *Geo.* 3, c. 68, and to *Rex v. Horner*. ||

3. That the order of magistrates was bad because it included several roads, and that there ought to have been a separate order for each road; and in support of this objection he referred to the margin of the schedule of 13 *Geo.* 3, and to *Rex v. Kenyon*. ¶

4. That the order was bad because it did not set out the length and breadth or the termini of the roads, which it ought to do, because the soil of any road stopped up was by the Private Inclosure Act directed to be allotted by the commissioners; and for this he referred to *Rex v. Kenyon*.

6. That the recitals in the award were only *prima facie* evidence of what was there stated, and that the recitals to the effect that the roads were properly stopped up, were contradicted in evidence.

\* 2 Barn. & Ald. 228.

† 3 Barn. & Ald. 414.

‡ 5 Barn. & Cressw. 241; 7 Dowl. & Ryl. 857; 4 Dowl. & Ryl. Mag. Ca. 8.

§ 6 Barn. & Cressw. 110; 9 Dowl. & Ryl. 111; 4 Dowl. & Ryl. Mag. Ca. 216.

|| 2 Barn. & Adol. 150.

¶ 6 Barn. & Cressw. 640; 9 Dowl. & Ryl. 694; 4 Dowl. & Ryl. Mag. Ca. 476.

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because they are but continuations of No. 7 (highway), and the stopping up of No. 7 makes them impasses or culs-de-sac. But it is said that the order of justices is bad in not stating that the justices *acted upon a view* of the roads. Undoubtedly an order for stopping up highways should be made upon the view of the magistrates, but that it *was* so made sufficiently appears upon the face of this order. It states that the justices "having particularly viewed" the roads, "and being satisfied" that they are unnecessary, "do order" them to be stopped up. It must be taken from the language used, that the justices were *upon the view, satisfied* that the roads were unnecessary. *Rex v. Justices of Worcestershire* is therefore inapplicable.

By the operation of the Inclosure Act, all highways and paths in East-Hampstead, not set out in the commissioners' map, or finally ordered to be set out or continued, are to be for ever stopped up and extinguished, and are to be deemed and taken as part of the lands and grounds to be divided and allotted. *None* of the roads in question were set out or finally ordered to be set out in the map as public roads. All of them are consequently for ever extinguished by the operation of the act, and have been, as the act required, allotted either as land or as private occupation roads. It will probably be urged, that admitting the roads over the heath to have been stopped up by the operation of the act, such of the roads as pass through old inclosures, are preserved by the proviso in the enactment. To this argument the answer is, that by the extinguishment of the roads over the heath, and their allotment under the act, the roads through the old inclosures are become impasses or culs-de-sac, and having thus lost the character of *thoroughfares*, can no longer be considered as public roads. For example, the commissioners have allotted the land at the

id of No. 1, (Bond's Lane,) to the Marquess of *Downshire*, partly as new inclosure, and partly as a private occupation road, in continuation as such of Bond's Lane. Bond's Lane, it is submitted, is therefore stopped up. In *Wood v. Veal* (a), *Abbott*, C. J. said, "I have great difficulty in conceiving that there can be a public highway which is not a thoroughfare, because the public at large cannot well be in the use of it." *Logan v. Burton*, *Farber v. Rand*, and *Thackrah v. Seymour*, are all distinguishable from the present case. The last case was decided upon the 11th clause in the General Inclosure Act, the language of which is very different from the language of this act. *White v. Reeves* (b) is directly in point, and is an authority to shew that the road was stopped up. [*Patteson*, J. If the commissioners had intended to destroy the character of this road, they ought to have allotted the soil of it.] They have set it out as a private occupation road. [*Patteson*, J. They had no authority to do that.] The commissioners had power to stop up all that continuation of the road which went over the waste. They have exercised that power, and the consequence is, that Bond's Lane is become an impassable cul-de-sac. By operation of law, as soon as the public cease to have a right to go to the extremity of a road, they cannot go on any part of it. [*Patteson*, J. Suppose a bank were built across a highway, would it cease to be a public road?] If done by competent authority. In *Wood v. Veal* there would have been a dedication to the public, had not the passage been stopped up at one end. It would have been idle to stop up Bond's Lane by one order, and then make another order constituting it a private road. [*Patteson*, J. The commissioners have treated this as a private road, and

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(b) 2 B. Moore, 23.

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they thought it was so, but it now turns out to be a public one.] Because Bond's Lane is set out as an occupation road, it is not the less stopped up as a public road. If Bond's Lane is stopped up, No. 8, which ran from it to Bowyer's Common, is, from a parity of reasoning, also stopped up. The same argument will hold with respect to No. 7, or "The Road to the North," and to the footway (No. 9), which ran from it across East-Hampstead Park to the heath.

No. 1 is stopped up because it is become an impass or cul-de-sac.

Nos. 2, 3, and 4, are extinguished because they are not set out.

Nos. 5 and 6 are extinguished because they are not set out, and also because they run into No. 7, which is stopped up by the order.

No. 7 is stopped up by the order, and also by reason of Nos. 5 and 6 not being set out.

No. 8 is extinguished because it runs into No. 1, which is stopped up.

No. 9 is stopped up by the order, and also because it runs into No. 7, which, in one view of the case, is stopped up as an impass or cul-de-sac.

*Ludlow*, Serjt., Sir *W. W. Follett*, and *Maclean*, in support of the rule. It does not distinctly appear upon the face of the order, that the justices acted upon view. *Rex v. The Justices of Worcestershire* is certainly in some measure distinguishable from the present case, because there the form of the order was, "We &c. having upon view found, or it having appeared to us that &c., do order &c.;" but that case determines this,—that the order ought to shew that the justices have had a view, and that it appeared to them *upon that view* that the

highway was unnecessary. Consistently with what is stated on the face of this order, the justices may have come to the conclusion that the highways were unnecessary, upon other evidence, and by other means than by their own view. The order is therefore invalid, and cannot have the effect of stopping up any of the roads.

By the verdict, it appears that (No. 1) Bond's Lane and the other roads were public roads, and the public had consequently a vested right in those roads previously to the passing of the Inclosure Act. The question then is, Have the commissioners destroyed that vested right? It is true that the act states that if the commissioners omit to set out and continue any of the roads in East-Hampstead, they are to be extinguished; but the proviso declares that no roads *passing through old inclosures* shall be stopped up, without an order of justices. No. 1, (Bond's Lane,) it is admitted, passed through old inclosures, and so likewise does No. 8 (footway), and neither of them is included in the justices' order, and therefore they are not stopped up. If No. 1 (Bond's Lane) be not stopped up, the roads No. 2, 3, 4, which run into it, and are in fact continuations and parts of it, still, in law, retain their existence. *Logan v. Burton*, *Harber v. Rund*, and *Thackrah v. Seymour*, shew that where a road passes partly through inclosed lands, and partly over land to be inclosed, the commissioners have no authority to stop it up without an order of justices. It never was intended to give the commissioners the power to stop up old roads not necessary to the inclosure. The same answer of course applies to the second argument, with respect to No. 7, ("The Road to the North,") and the roads running into it.

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Lord DENMAN, C. J., in the course of this term, delivered the judgment of the Court, which, after stating the record and the proceedings, proceeded as follows:—The roads were nine in number; that is to say, (as laid down in the plans both of the prosecutor and defendant, which agreed,) Nos. 1 to 7 inclusive, highways; the former (No. 1) being called in the evidence and upon the plans “Bond’s Lane,” the latter (No. 7) being called in the report “The Road to the North,” and by the plans also appearing to go in that direction; and Nos. 8 and 9 (footways). Into No. 1 (Bond’s Lane) ran the roads over certain commons, before their inclosure, designated by the Nos. 2, 3, and 4, in both the plans respectively; and into No. 7 (The Road to the North) ran the Nos. 5 and 6, also passing over commons, and also laid down in the plans of the prosecutor and defendant. As to the roads generally, they were found by the jury or admitted by the defendant’s counsel to have been public; that is to say, the first seven to have been public highways, and the last two to have been public footways. The burthen therefore of shewing that they had ceased to be such, or, in other words, had been legally stopped up, clearly lay upon the defendant.

For this purpose, as to No. 7 highway, and No. 9 footway, a certain order of justices, bearing date 28th March, 1827, was relied upon; and as to Nos. 5 and 6, (before described as leading into No. 7,) that they were virtually stopped up by the same order. As to the rest, viz. No. 1 (Bond’s Lane), and Nos. 2, 3, and 4, leading into it, and No. 8 (footway), certain acts of commissioners, under 1 & 2 *Geo. 4*, cap. 32 (*a*), “for inclosing Lands within the Manor and Parish of East-Hampstead,” were relied upon. Indeed it was by some of the counsel for the defendant contended, that what had been done

(*a*) Private Act.

nder the act above cited was effectual for stopping up all the roads, and that the order of justices, as to those which it applied, was *ex abundanti cautela* only, and superfluous.

It may therefore be convenient, perhaps, first to consider the last-mentioned ground of defence—applicable to all. By 1 & 2 *Geo.* 4, cap. 92 (*a*), commissioners are empowered to make new roads, and also “to direct, make, alter, or stop up any of the present public or private carriage roads, or highways, or footpaths, over the parish of East-Hampstead, as they shall think proper.” They are also directed to prepare and sign a *map* describing the roads, and to give certain notices therein prescribed, and to hold a meeting for the purpose of hearing objections and complaints,—in which they are to be assisted by a justice or justices of the peace for the division,—the commissioners and justice or justices to have power to confirm or alter the said map. Then comes the clause relied on for the defendant, “and all roads, highways, ways, and paths, in, through, and over the said parish of East-Hampstead, or any part thereof, which shall not be set out, or finally ordered and directed to be set out and continued as aforesaid, shall be for ever stopped up and extinguished; and shall be deemed and taken to be part of the lands and grounds to be divided and allotted by virtue of the said act.” It has therefore been argued, that as none of these roads have been set out and continued, they are at once extinguished. We think, however, that it is unnecessary to do more than refer to the proviso contained in the very clause which confers the above power upon the commissioners, for the purpose of shewing that the argument has no weight:—“Provided also, that no roads passing through old inclosures within the said parish, shall be stopped up,

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(a) Pages 12 and 13.

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diverted or turned, or in any way altered, without an order for that purpose, under the hands and seals of two of his majesty's justices of the peace for the said county of Berks,"—which is to be subject to appeal in the manner directed. We consider this to be decisive, and that consequently No. 1 (Bond's Lane) and No. 8 (footway), which are uncovered by any such order, still exist, in point of law, as a highway and footway respectively; passing as they do undoubtedly, according to both the plans, through old inclosures. It is scarcely necessary to add, that the force of this proviso seems to have been felt, or else why was an order of justices procured for Nos. 7 and 9 respectively.

We are next to consider the effect of No. 1 (Bond's Lane) existing still, so far as Nos. 2, 3, and 4, highway leading into it, are concerned. We call them highway, because, as has already been observed, they were found, or admitted to be so, subject of course to the effect of the proceedings which we have already noticed. Their leading over commons is a circumstance wholly immaterial as to their being or not being public highways, and assuredly they may, and indeed must be such, if in the direction leading from Bond's Lane they terminate (as in Bond's Lane they do) in an ancient and public highway. The consequence therefore seems to be, and we think is, that No. 1 (Bond's Lane) still remaining in law a highway, those above mentioned (Nos. 2, 3, and 4) remain so likewise. It seemed at first as if another course (laid down upon the prosecutor's plan) had been intended to be substituted for Nos. 2, 3, and 4, and to supersede these roads. It is obvious, however, that this cannot be, for there is no *public* communication between that course which we are noticing and Bond's Lane, that communication (such as it is) being expressly laid down as a *private* occupation road.

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We are lastly to examine the effect of the order of justices above adverted to, by which (independently of the supposed stoppage, by their not being continued as roads by the commissioners) No. 7 and No. 9 are supposed to have been legally stopped up,—or, in other words, we are to examine the *validity* of the order of justices. That order is in the following form. (Here, his lordship read the order.) Now in ascertaining how far this order can be sustained, it is to be premised that it must be made “upon view” of the justices. So says the statute: and accordingly we consider that an inquiry is not open to us, whether any *other* mode of proof be sufficient to inform and satisfy them. Actual inspection is to be the foundation of their jurisdiction, and perhaps a knowledge of the state of the country—necessary and commodious passage and communication &c.—may be better so acquired than otherwise. So, however, *it is written*. Now upon this subject of the jurisdiction of justices of the peace, we are not aware that any material distinction has been made in this Court between the mode of construction of an *order* of justices and a *conviction* by them, whatever favourable intendment may be made in support of the former, when once the essential point of jurisdiction is established; *Rex v. Hulcott* (a). This point therefore being (as we conceive it is) perfectly clear, the question is, whether the original allegation of “*a particular view*” does necessarily, or by fair construction, extend over the whole order, up to the passage which directs the stoppage. Or rather, does not the statement of “being satisfied &c.” stand wholly independent of the original allegation of *view*? Whatever might have been the inference, if the recital had been continued in an unbroken chain, from the beginning to the end, the case is otherwise here. The clause containing the original and material allegation

(a) 6 T. R. 583.

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of "a view," is separated in a very marked manner from that wherein the satisfaction of the justices, and the grounds of it, are contained. It would be a very violent and forced construction, as we think, to refer the grounds of the procedure by the justices *to the view* in the earlier part of the order, rather than to some other means, by which their judgment was influenced and themselves "satisfied," as declared in the subsequent part of that order. We think that it does not, by any fair or reasonable inference, (and such only ought we to apply,) follow, that the motive operating upon the justices was the view only. They might, consistently with a fair and reasonable construction of the order, have been influenced by other proof. If so, the justices never obtained jurisdiction over the subject, and their order cannot be supported. No. 7, highway, and No. 9, footway, stand therefore in the same position as the other roads, respecting which our opinion has already been pronounced. We have only to add, that the effect of the order of justices being removed is, that Nos. 5 and 6 (branches, if they may be so called, of No. 7, because leading into it,) are in the same situation with respect to No. 7, as Nos. 2, 3, and 4 are in with respect to No. 1 (Bond's Lane). It is not necessary, therefore, to repeat the reasons which induce us to arrive, as to them, at the same conclusion.

The result therefore is, that a verdict must be entered for the Crown, as to all the roads above particularly specified.

Rule absolute.



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## LANG v. SPICER (a).

RESPASS for assault and false imprisonment.—  
ea: not guilty. By consent of the parties, the fol-  
lowing case was, under the order of *Gurney, B.*, stated  
to the opinion of this Court.

The plaintiff is, and at the time of the alleged assault  
and imprisonment was, living in the parish of Portsea,  
within the borough of Portsmouth, in the county of  
Hampshire. The defendant is, and was at that time,  
one of his Majesty's justices of the peace in and for the  
said borough. On the 7th day of August, 1832, *Ed-*  
*ward Carter* and *William Cooper*, Esquires, two of his  
Majesty's justices of the peace in and for the borough

Portsmouth, made an order of filiation against the  
plaintiff concerning a male bastard child, then lately  
born in the parish aforesaid of the body of one *Mary*  
*in Chalton*, single woman, whereby the said last-men-  
tioned justices did adjudge the said plaintiff to be the re-  
puted father of the said bastard child; and thereupon they  
made an order, as well for the better relief of the said parish

Portsea, as for the sustentation and relief of the said  
bastard child, that the said plaintiff should pay or cause  
to be paid to the churchwardens and overseers of the  
parish of the said parish of Portsea for the time being,  
to some or one of them, the sum of 2s. weekly and  
every week from the then present time, for and towards  
the keeping, sustentation, and maintenance of the said  
bastard child, for and during so long time as the bastard  
child should be chargeable to the said parish of Portsea.

By the 4 & 5  
*Will. 4*, c. 76,  
s. 57, the pu-  
tative father  
of a bastard  
child born  
before the pas-  
sing of the act,  
whose mother  
is married to  
another per-  
son, is no  
longer liable  
on an order of  
justices for the  
maintenance  
of such child;  
at least while  
the husband is  
of ability to  
maintain it.

*Semble*, the  
4 & 5 *Will. 4*,  
c. 76, s. 57,  
operated as a  
repeal of the  
18 *Eliz. c. 3*,  
s. 2, and 49  
*Geo. 3*, c. 68.

a) This and the following cases are taken, by permission, from Messrs. *Crompton, Meeson*, and *Roscoe's Reports of Cases* in the Court of Exchequer.

On the 10th day of November, 1834, *Chulton* was lawfully married to one *Joseph* still living. The said child was, at the date of the warrant hereinafter mentioned, about the age of 1 year and has been living with its mother and the said *Toe* since the said marriage.

In obedience to the said order, the plaintiff paid weekly and every week, the said sum of 2s. to be paid by him as aforesaid, until the 1st of March, 1835, when he refused and ceased to make further payment in obedience thereto.

The said child was chargeable to the said parish from the time of the said marriage, and after the said marriage still continued so chargeable up to the date of the warrant hereinafter mentioned, and was supported by the officers of the parish from the payments made by the said plaintiff as long as they were so made; and after the said plaintiff discontinued his payments, the said child was supported by the officers from the stock and at the expense of the parish. The means of livelihood of the said child and *Mary Ann* were at that time 15s. a-week; and he received as wages for labour, his family then

defendant, so being such justice, of the above circumstances, whereupon the defendant issued his summons to the plaintiff to appear before him and answer. The said plaintiff appeared thereupon, and shewed cause before the said defendant why he should not make any further payments, and refused to make any further payments in obedience to the said order. The defendant considered the cause so shewn to be insufficient, and thereupon convicted the plaintiff; and by warrant, dated the 3d day of September, 1835, committed him to prison, in which he remained a short time, when he paid what was required, and was discharged.

The action is brought in respect of that imprisonment. No question is raised regarding the said order, or any of the proceedings before the said justices, in point of form, nor regarding the sufficiency of the plaintiff's notice to the defendant of this action. All were duly made according to the several statutes in such case respectively provided.

The question for the opinion of the Court is—

Whether, under the above-mentioned circumstances, the liability of the plaintiff to make any further payments in obedience to the said order, after the said marriage, was suspended or removed by the statute of the 4th and 5th Will. 4, c. 76, and particularly by the 57th section of that statute. If the Court shall be of opinion that his liability was not suspended nor removed, then the plaintiff agrees that a judgment shall and may be entered against him of nolle prosequi, immediately after the decision of this case, or otherwise, as the Court may think fit. But if the Court shall be of a contrary opinion, then the defendant agrees that judgment shall be entered against him by confession, of 10*l.* damages, immediately after the decision of this case, or otherwise, as the Court may think fit.

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*Thesiger*, for the plaintiff. The plaintiff's liability was put an end to by, or at least suspended during, the marriage, by the operation of the above clause. It may be said, that it applies only where the illegitimate child was not actually chargeable at the time of the marriage. But that construction will not carry into effect the intention of the legislature, which was to prevent the husbands of women in such circumstances from obtaining the benefit of that *dowry* of illegitimate children, which was so pernicious both to the morality and the industry of the poor. Where the words of a statute are clear and unambiguous, the best course is to adopt them according to their natural and ordinary meaning. Even where the decision on the words of an act of parliament was calculated to defeat its apparent object, the Court has held it better to abide by such consequence, than to put upon it a construction not warranted by its words, in order to give effect to its supposed intention. *Rev. Barham (a)*.

*Dampier*, contra. This order remained in force, notwithstanding the marriage of the mother. It is made under the statute 18 *Eliz.* c. 2, s. 2, as amended by the 49 *Geo.* 3, c. 68. The 4 & 5 *Will.* 4, c. 76, s. 57, is *affirmative* only, and not *negative*, in its terms. The question then is, whether it shall operate to destroy the positive enactments of former statutes. The child is to be deemed a part of the husband's family only "for the purposes of the act;" not generally, or to all intents and purposes. Again, it appears from s. 70, which avoids securities given for the indemnity of parishes as to bastard children, that the act meant to preserve in force all such as had passed into absolute securities before the

(a) 8 Barn. & Cress. 104.

passing of the act, inasmuch as it is made to apply only to securities given in respect to children likely to be born bastards, and whereof any woman shall be pregnant at the time of the passing of the act. No doubt the husband is liable to the parish for relief given to the child; that is to say, he is liable, having this fund provided for him by means of the putative father. Both may be chargeable, and both primarily liable to the summary jurisdiction of the justices: in the same manner as two funds may co-exist for the repair of a highway,—the primary liability of the inhabitants of the district, and the tolls in the hands of trustees, to which the parish has a right to resort. *Rex v. Netherthong (a)*, *Rex v. Inhabitants of Oxfordshire (b)*. Both parties commit an offence if they do not provide the necessary funds. The words of the statute will not be violated, but maintained, by holding them applicable in their strict terms only to children thereafter born, or at all events to cases in which there was not before any complete security. If this be not so, the justices in sessions will have no power, under s. 72, to make orders upon the putative father after the marriage of the mother.

*Thesiger* in reply. Where a later statute has affirmative words inconsistent with those of a former act, the former act must be held to be repealed. Such is the case here. It is said there are two funds for the relief of the child; but the statute says no such thing. The putative father is not to supply a fund *to the husband*: so long as the child continues chargeable, and the charge is to be provided for *under the order*, the putative father is liable to pay *to the parish*; it is a question altogether between him and the parish; the husband has nothing

(a) 2 B. & Ald. 179.

(b) 4 B. & C. 194; S. C. 6 D. & R. 231; 3 Dow. & Ry. Mag. Ca. 79.

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 ~~~~~  
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to do with that fund, nor with the claim of the parish on the putative father. If he has, how is he to reach the fund? The defendant must say, that payment by the father to the parish discharges the husband from the obligation of maintenance; whereas the act says positively that the husband shall maintain the child. [Lord *Abinger*, C. B. Suppose the husband incapable from poverty of providing for the child, what would you say to that case?] Perhaps the liability might then attach again on the putative father; possibly the order is only suspended while the child continues to be maintainable as a part of the husband's family. This, however, would not prevent the general principle from having effect, although in the particular case it might not be capable of application. But in such case, the husband would himself become chargeable by reason of that inability, because he is chargeable for relief given to any part of his family.

LORD ABINGER, C. B.—I do not know whether the object of the legislature will be attained by the decision to which we think ourselves bound to come: but I think we are bound to interpret the positive provisions of this act as we find them, and that there is no reason why we should speculate on what would be the situation or claims of the parties, if the husband were incompetent to maintain the child; the effect of that would undoubtedly be, under this act, to bring the burden of himself, and all his family, upon the parish. But under the circumstances stated in this case, and assuming the husband to be competent to maintain the child (*a*), we have here a distinct parliamentary provision imposing the

(*a*) This was admitted between the parties, although it was not expressly stated in the case.

charge upon the husband. A fund is therefore provided for the maintenance of the child, and it is no longer chargeable upon the parish during the continuance of that fund. The orders of filiation under the former acts were to be made in case of the parish, and the parish had no right to insist on them unless the child were chargeable. Then, by the provisions of this act, the child having ceased to be chargeable, the parish has no longer any power to claim the enforcement of the order.

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PARKE, B.—I am of the same opinion. No question is raised as to the liability of the magistrates in the action of trespass; the question which, by agreement of the parties, is submitted for our decision, is, whether the putative father is still liable for the maintenance of this child; and it seems to me that he is not. It is admitted that the husband had sufficient funds for its maintenance; while they remain sufficient, the child cannot be said to be chargeable; but the putative father is liable only so long as the child continues chargeable. It is not necessary to say what would be the consequence in case of the husband's incompetency; but although it is true as a general proposition, that affirmative words in a statute do not operate as a repeal of a previous affirmative enactment, unless where they are clearly inconsistent, yet, looking at the general policy of this act of parliament, and seeing no provision for the *joint* liability of the husband and the putative father, I should say the effect of the affirmative words in this clause is to repeal the provisions of the former acts, which have been referred to, as inconsistent, and to destroy altogether the effect of the order during the marriage of the mother. And it may be observed, that this construction makes

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the whole system uniform: the putative father can never be called upon after the marriage; and it is clear from s. 72, that it is only in case of the inability of the mother that an order of bastardy can be made, in respect of after-born children, by the justices at sessions.

BOLLAND, B.—I am of the same opinion. The words of the statute are clearly intended to impose upon the husband the liability of maintaining the illegitimate children of his wife. The liability to the parish can, at all events, only arise out of the inability of the husband; but it is admitted that he had in this case sufficient ability to maintain the child. And it is difficult to see how the putative father can continue liable at all. This test may be applied:—suppose, the child being chargeable, the mother marries; if the liability is still upon the putative father, this provision of the act is inoperative altogether. If the time arrives when the child attains the age of sixteen, or if the mother dies, the parish may be called upon to bear the charge, but not till then. I think the parish is, in this case, asking the Court to compel the putative father to do that which he is no longer bound to do by law.

GURNEY, B.—The statute certainly transferred the liability altogether from the putative father to the husband.

Judgment for the defendant.



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## FOSBROOKE v. HOLT.

**THIS** was an action of trespass, brought against a justice of the peace, in which the plaintiff, before issue joined, had obtained a rule to discontinue on payment of costs. The Master, on taxation, on the 3d of December last, had taxed the defendant single costs only, and the allowance of such costs was obtained on the 4th of the same month. The defendant then took out a summons, calling upon the plaintiff to shew cause why he (the defendant) should not be allowed double costs; but on the matter being heard before *Alderson, B.*, he refused to interfere. On the 8th of December, the plaintiff's attorney offered to pay the amount of double costs taxed, to avoid the risk of a motion, which the defendant's attorney refused to receive, unless the plaintiff's attorney would consent to a judge's order allowing a suggestion to be entered on the roll, which the latter refused to do, as a second action was brought, and the suggestion might be used adversely at the trial. *Cresswell* having, on the 23d of January, obtained a rule to shew cause why a suggestion should not be entered on the roll, and why the Master should not review his taxation,

A justice of the peace is not entitled to have a suggestion entered on the roll, that the action was brought against him for an act done by him as a justice of the peace, in order to obtain double costs.

*Semble*, That a justice of the peace is entitled to double costs on discontinuance before trial, under 7 Jac. 1, c. 5.

*Hoggins* now shewed cause, and contended, first, that the defendant was not entitled to double costs at all; and secondly, that he was not entitled to enter any suggestion on the roll. The statute 7 Jac. 1, c. 5, provides that if any action shall be brought against any justice of the peace &c., for any thing done by him by virtue of his office, he may plead the general issue, and give the special matter of defence in evidence; and that "if the verdict shall pass for the defendant in any such action,

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or the plaintiff therein become nonsuit, or suffer any discontinuance thereof, in every such case the justice or justices, or such other judge before whom the said matter shall be tried, shall, by force and virtue of this act, allow unto the defendant his double costs, which he shall have sustained by reason of his vexation in defence of the said action, for which the said defendant shall have like remedy as in other cases where costs by the laws of this realm are given to defendants." The statute says, that the judge shall allow double costs; therefore it applies only to a case where the matter is tried in Court, or where there is a discontinuance in Court after the cause has been tried, and not to a case where issue has not been joined, as in the present instance. *Davenish v. Mertins* (a) may be cited on the other side, but it is no authority for the present application for them. The Court there directed the Master to allow the double costs as part of the terms of granting the discontinuance, but they discharged the rule as related to the suggestion. Besides, as the discontinuance in the present case had already been allowed, the defendant is too late in his application, and must be taken to have waived his claim to double costs.

*Cresswell*, contrà. It is clear, that under this statute the defendant is entitled to double costs; and if so, a suggestion may be entered. The statute intends to say, that the justice or justices,—that is, the Court in the case of a discontinuance,—or a judge, that is, where the cause is tried and there is a verdict for the defendant, or the plaintiff is nonsuited,—shall allow the defendant his double costs. It does not require that the discontinuance shall be after a trial had. If the defendant is enti-

(a) 2 Stra. 974; S. C. 2 Barnard, 372, 435, 449.

tled to double costs, he is entitled to have a suggestion entered on the roll. [*Parke, B.* It is not necessary. There is a difference between this case and cases under the Court of Conscience Acts; because in the latter cases, there must be something on the record to justify their allowance. But in this case, in whatever way the costs are taxed, there will be no error in the judgment.] There can be no harm done to the plaintiff by entering the suggestion, and supplying that on the record which would enable the defendant to use it in evidence in any future proceeding, to shew that this action was brought against him in his character of justice of the peace.

**LORD ABINGER, C. B.**—That is not a purpose for which a suggestion ought to be allowed to be entered. There is no example of a suggestion having been entered in such a case, and there could be no necessity for it, the plaintiff having offered to pay the double costs.

**PARKE, B.**—A suggestion has been often entered unnecessarily. The plaintiff was willing to pay the defendant the costs without this application, and he was therefore brought here unnecessarily. The rule must therefore be discharged with costs.

Rule discharged with costs, the plaintiff undertaking to pay the double costs.

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AUGERO v. KEEN and another, Executors of GEORGE KEEN, deceased.

A bond given to secure a faithful performance of the office of a collector of parochial rates (who was by act of parliament to be appointed by trustees for a year, and then to be capable of re-election) was conditioned, that "from time to time, and at all times thereafter, during such time as he should continue in his *said* office, whether by virtue of his *said* appointment, or of any re-appointment thereto, or of any such re-tainer or employment by or under the authority of the said trustees, or their successors, to be elected in the manner directed by the said act, he should use his best endeavours to collect the monies received by means of the rates, in the then present or in any subsequent year," &c. &c.:—Held, that the obligation of the bond was not confined to the year for which he was originally appointed, but extended also to all subsequent years in which he was continuously re-appointed.

THE plaintiff declared as clerk to the trustees for executing an act of parliament of the 10 *Geo.* 4, (the Lambeth Watching and Lighting Act, 10 *Geo.* 4, c. cxxix,) on a joint and several bond, dated the 10th July, 1830, given by the defendant's testator, together with *J. R. Pavey* and *W. Pugh*, to seven of the then trustees for putting the said act into execution, on behalf of themselves and the other trustees appointed by the act, in the penal sum of 400*l.*, to be paid to the said trustees thereinbefore named, or the survivor or survivors of them, or their or his attorney, executors, administrators, or assigns.

The plea craved *oyer* of the bond and of the condition. After reciting that at a meeting of the trustees under the act, held on the 10th of July, 1830, the said *J. R. Pavey* having been required to give good and sufficient security, by entering into a bond with two sureties, in the penalty of 400*l.*, for the due execution of his said office, and for duly accounting for the monies to be collected and received by him therein, had agreed to give such security, and had accordingly, together with the said *W. Pugh* and *George Keen*, entered into the above bond or obligation; the condition was, that if the said *Pavey* should, from time to time and at all times thereafter, during such time as he should continue in his *said* office of collector, whether by virtue of his aforesaid appointment, or of any re-appointment thereto, or of any

such retainer or employment by or under the authority or with the consent or acquiescence of the said trustees, or their successors, to be elected in the manner directed by the said act, or any seven or more of them, duly, attentively, and faithfully execute and perform the said office, and use his best endeavours to collect, get in, recover and receive, the rates and assessments which should or might at any time or times thereafter, during the then present or in any subsequent year, be made under or by virtue of the said act of parliament, &c. &c. (there were various stipulations for the faithful performance of the office, payment over of money, &c.) the bond should be void, or otherwise should remain in full force and virtue. The plea then alleged, that the said office of collector in the condition mentioned, was the office of collector of the rates and assessments, constituted and mentioned in and by the said act of parliament; that after the making of the act, and before the making of the said writing obligatory, to wit, on the 1st of July, 1833, the said trustees, by writing under their hands, in manner and according to the provisions of the act, did appoint the said *Pavey* to the said office of collector, in the condition mentioned, and under and by virtue of that appointment he did remain and continue in the said office until and upon a certain day, to wit, until and upon the 10th day of July, 1834, being the next meeting of the said trustees after the annual day of election of such trustees, as in the said act mentioned, when the said office, and duties and employment of the said *Pavey* therein, ceased and determined. The plea then went on to allege performance of all the terms of the condition, "during the said term that he the said *Pavey* remained in the said office of collector as aforesaid."

Replication, that after the said *Pavey* had been so appointed to the said office of collector, as in the plea

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mentioned, and after the making of the said writing obligatory, and after the first year of his employment and duties in the said office had ceased and determined, and before the commencement of this suit, to wit, on the 9th of July, 1834, the said trustees, at a meeting then duly held in pursuance of the said act of parliament, did, by writing under their hands, in manner and according to the provisions mentioned and contained in the said act of parliament, re-elect and re-appoint the said *Pavey* to the said office of collector in the said condition mentioned, and the said *Pavey* did then accept the said office in pursuance of such re-appointment, and continued to be and was retained and employed as such collector, by the authority and with the consent and acquiescence of the said trustees, from the time of his said re-appointment until the 10th day of June, 1835. The replication then alleged, that after his re-appointment, and while he held the said office, and was so retained and employed therein as aforesaid, to wit, on the 11th of July, 1834, and on divers other days and times between that day and the time when he finally ceased to be employed as such collector, after the said re-appointment, he committed breaches of the condition, by not paying over divers monies collected on account of the rates.

To this replication there was a special demurrer, assigning various causes, which however were abandoned on argument; the following ground of demurrer was also stated in the margin:—that the obligation of the bond only extends to the faithful performance by *Pavey* for one year. Joinder in demurrer.

*W. H. Watson*, in support of the demurrer. This was an obligation which was fully performed when the said office to which *Pavey* was originally elected and appointed ceased and determined, viz. on the 10th of July, 1834.

By the 13th section of the act, the trustees are empowered to appoint the officers, and it is provided that they shall hold their offices and appointments no longer than until the next meeting of the trustees after the next annual day of election of trustees, at which, or at any subsequent meeting, they shall respectively be capable of being *re-elected*. [*Parke, B.* How do you get over the words of the condition, "by virtue of his aforesaid appointment, or of any re-appointment thereto?"] They may be satisfied by applying them to the case of a re-appointment in consequence of an invalidity in the original appointment. The argument on the other side must go to this extent, that if the office were vacant for a year, and the party were then appointed again, the obligation would attach. [*Alderson, B.* That would be a fresh appointment, not a re-appointment. *Parke, B.* The words of the condition are, "if he should, during such time as he should *continue* in his said office, &c." Lord *Abinger, C. B.* If the words were, "by virtue of any *resumption of* or re-appointment to his office," there might be something in your argument.] Wherever the office is an annual one, to make the bond a continuing obligation, there ought to be words clearly and without doubt pointing to its continuance beyond the year. Much importance has always been attached to the words "said office," and limitations of similar import. In *The Liverpool Waterworks Company v. Atkinson* (a), where the defendant had agreed with the plaintiffs to collect their revenues from time to time for twelve months, with a stipulation that "at all times thereafter, during the continuance of *such his employment*, and for so long as he should continue to be employed," he would use all diligence in collecting all rents &c. which should *annually*

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(a) 6 East, 507.

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grow due to the company, and justly account &c., the obligation was held to be limited to the twelve months. Lord *Ellenborough* lays all the stress of the case on the words "said office," and "such his employment," as being words of reference, and incorporating all the terms to which they bore reference. And *Le Blanc, J.* says, "the subsequent stipulations by the defendant to account &c., during the continuance of his employment &c., refer to the original employment in point of time." In *Hassell v. Long* (a), a bond conditioned for the due payment of monies by a collector of land-tax was held to be confined to the current year in which he was, at the date of the bond, collector, though it did not appear on the condition that he was appointed for a year only; it being shewn by the plea that the office was an annual one, although it also appeared by the replication that he continued to hold it for many years. *Peppin v. Cooper* (b) is to the same effect. [Lord *Abinger, C. B.* It is not disputed that something must appear on the face of the bond, to shew that it applies to a continuance in office beyond the year; it is for you to make out that that is not shewn on this bond. *Bolland, B.* The words "said office" are merely descriptive. *Parke, B.* To found your argument, you must strike out altogether the words "or in any subsequent year."] They are not stronger than the word *annually*, in *Liverpool Waterworks Company v. Atkinson*. [*Parke, B.* Those words furnish a construction for the word "re-appointment;" it is clear it means a re-appointment in any subsequent year. *Alderson, B.* The construction you contend for must also reject the word *successors*, "to be elected in manner directed by the act," which must therefore be in subsequent years.] If the words "in any subsequent year"

(a) 2 M. &amp; Sel. 363.

(b) 2 B. &amp; Ald. 431.

conflict with the words "said office," they ought to be rejected, unless they be applied to the two years 1833 and 1834, into both of which the first appointment extended. [Lord *Abinger*, C. B. The words "said office" respect its nature, not its duration.] Again, the office is one not only of appointment, but of election also; if the bond was to extend to several years, it should have also said "by virtue of any *re-election*."

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LORD ABINGER, C. B.—It would be difficult to find any words more clear than those employed in this case, to shew that the parties meant to provide for the continuance of the party in office. In order to save expense, as long as he continues in office under his original appointment, or any continuing re-appointment, only one bond is to be required.

PARKE, B.—I entertain not the slightest doubt in this case. The bond applies to all future years during which the party is continuously re-appointed. Whether it applies to a case in which there is a chasm in the office, and then he is re-appointed, we are not called upon to say.

BOLLAND and ALDERSON, Bs., concurred.

Judgment for the plaintiff.



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M'GAHEY, Vestry Clerk of St. Pancras, Middlesex, v.  
ALSTON and another.

The subordinate officers appointed under the St. Pancras Vestry Act, 59 Geo. 3, c. 39, s. 19, by the select vestry, are not annual officers, but hold their offices during the pleasure of the vestry. Therefore, the bonds given by them to the directors of the poor (who are annual officers,) under s. 57, continue in force after the directors to whom they were given have gone out of office.


**DEBT** on bond, dated 1st of January, 1834, given by the defendant to the directors of the poor of the parish of St. Pancras, and their successors, in the penal sum of 500*l*. The plea cravedoyer of the bond and condition, which, after reciting that the defendant *Alston* had, in pursuance of the powers and authorities contained in an act of parliament passed in the 59th year of the reign of King *Geo. 3*, intituled, "An Act for establishing a Select Vestry in the Parish of St. Pancras, in the County of Middlesex, and for other purposes relating thereto," been elected and appointed an officer or servant of the vestrymen and directors of the poor of the parish of St. Pancras, under the title and denomination of paying agent and accountant,—was for the faithful execution of such office, so that no loss or injury should be sustained by the vestrymen or directors, or their successors, or by the parishioners, and for the faithful accounting upon oath at the weekly and other meetings of the directors, and their successors, and at all other times when required by the vestrymen and directors, for all monies received in the execution of the office, &c. &c.: and it provided also, that the defendant should, within ten days next after he should have been removed from or have quitted his said office, make up his accounts, and pay over any balance in his hands to the treasurer or clerk of the vestrymen or directors for the time being, and deliver up his books and papers to the vestrymen or directors, or their clerk or clerks for the time being, &c. The defendants then pleaded, that, at the time of the making of the said supposed writing obligatory, the said office of directors of the poor of the parish of St. Pan-


cras was, and still is, an annual office; and that the office of the said directors who were in office at the time of the making of the said writing obligatory expired before the commencement of this suit, to wit, on the 31st of March, 1834; and that the defendant *Alston* did, after the making of the said writing obligatory, during the continuance in office of the said last-mentioned directors who were in office at the time of making the said writing obligatory, to wit, from the time of making the same until the said 31st day of March, 1834, when the said last-mentioned directors went out of the said office, well and faithfully execute the said office of paying agent and accountant, in such manner that no loss, damage, or injury hath been or can be sustained by the said vestrymen of the said parish, or by the said directors or their successors, or by the said parishioners, &c. &c. [The plea then went on to aver performance, during the same period, in respect to all the other matters mentioned in the condition.]

General demurrer and joinder.

It was stated in the margin of the demurrer-book, that one point of law intended to be argued in support of the demurrer was, that the office of paying agent and accountant was not determined by the going out of office of the directors who were in office at the time when the bond was executed by the defendants.

*Peacock*, in support of the demurrer.—The office in question is not merely co-existent with that of the directors, but is a continuing one. The question depends on the construction of the St. Pancras Vestry Act, 59 *Geo.* 3, c. 39. By the third section of that act, select vestrymen are appointed, not limited to any particular period of continuance in office. By s. 19, the vestrymen, or the major part of them, assembled at any of their meet-

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ings, are to appoint the several subordinate officers as they shall deem necessary for the purposes of the act, to direct such security to be taken for the due execution of the office as they shall think proper, and are empowered from time to time to remove all such officers "at the will and pleasure of them the said vestrymen," and to revoke, countermand, and vary their appointments. The defendant, therefore, was an officer appointed, not by the directors, but by the vestrymen, and his office was determinable at their pleasure. Then, by s. 41. the vestrymen are annually, in Easter week, to appoint from among themselves directors of the poor, to continue in office only for the term of one year, and until other directors are appointed in their room. Where, therefore, the offices were intended to be annual, the act has so expressly provided. It is true that, under s. 57, all bonds are to be given to the directors, as trustees of the parish; but that does not make the appointment theirs. [*Parke, B.* The directors, then, as such, have nothing to do with the appointment, and must be taken to appoint only in their character of vestrymen.] The bond does not recite that the directors appointed, but only that the defendant was appointed "an officer or servant of the vestrymen and directors," which in some sense he is, since by s. 21 he is to account to the directors. On the whole, then, it is plain that this was an appointment by permanent officers for an unlimited time, and that there is nothing in the act which determined it on the going out of office of the existing directors. [*Lord Abinger, C. B.* There is not a word said about the officers being annual.]

*Tomlinson, contra.* In favour of a surety the Court will rather lean to the construction that the office and obligation are limited, if such construction can be rea-

sonably collected from the act. By s. 19, the salaries are to be paid "yearly or otherwise." By s. 21, the officers are monthly to account, and, within ten days after quitting their offices, to deliver up their books, &c. and pay over their balances, to the directors *for the time being*. That, and other provisions of the same kind where those words are introduced, appear to assume that the officers have gone out of office with the directors of the former year. By the terms of appointment, as recited in the bond, and the duties of the office as therein set forth, this officer appears to be the mere servant of the directors. But if he is the servant of the vestrymen *and directors*, when the existing directors cease to hold that office, an integral part of the entire body being gone, the obligation ceases. [Lord Abinger, C. B. If he is appointed a week before the directors go out of office, does he go out at the end of the week?] The defendants must so contend. The word "successors" in the bond may be satisfied by the successors of such directors as may die or be removed within the year.

LORD ABINGER, C. B.—Your case must depend on the words either of the bond or of the statute. It appears to me, that, though you are instructed to argue it, you cannot make a plausible argument upon either the one or the other. If every appointment is to be made over again at the end of every year, it would impose a most elaborate duty on the parish officers. The judgment must be for the plaintiff.

Judgment for the plaintiff.

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 M'GAHEY  
 v.  
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(Hilary Term, 1836—continued.)

The KING v. The Inhabitants of HARRINGTON, in the  
County of Cumberland.

A printed indenture of apprenticeship, which is ante-dated, is not therefore void, although in the notice required to be given by 5 G. 3, c. 46, s. 19, and which is in fact printed under the indenture, it is stated that in such case the indenture will be void.

UPON appeal, an order for the removal of *Robert Cook*, his wife and children, from Manchester to Harrington, was quashed, as to *Mary*, the eldest child, who was born a bastard in Manchester, but confirmed as to the other parties mentioned therein, subject to the following case:

*Robert Cook* had a derivative settlement in Harrington, and had gained no settlement in his own right, unless he gained one by apprenticeship.

In June, 1815, *Robert Cook* was bound apprentice by indenture to one *Michael M'Graa*, a ship-smith in Workington, for the term of six years. The indenture was a printed form filled up, and had at the foot of it the notice required to be added to all such printed forms, by 5 Geo. 3, c. 46, s. 19. The indenture bore date 13th June, 1813, but was not executed, in point of fact, until June, 1815. It was properly stamped, and in all other respects, except as to its being ante-dated, was perfectly regular. The pauper served between two and three years, and gained a settlement under the indenture in a third parish, provided a settlement could be gained at all by service under it. The sessions held the indenture absolutely void, by reason of its being so ante-dated, and no settlement gained by service under it.

The question for the opinion of this Court is, whether the said indenture was or was not void on account of its being ante-dated. If the indenture was valid, that part of the order of sessions, confirming the order of removal, is to be set aside. If the indenture was void, such part of the said order of sessions is to be confirmed.

*Wightman*, in support of the order of sessions. This

indenture was void by reason of its being ante-dated. By 8 *Anne*, c. 9, s. 35, it is enacted, that the full sum received, or in anywise given, paid, demised, or contracted for, with or in relation to any apprentice, shall be truly inserted and written in some indenture or other writing which shall contain the covenants, articles, or agreements relating to the service of such apprentice, *and shall bear date upon the day of the signing, sealing, or other execution of the same*; upon pain that every master to or with whom, or to whose use, any sum of money whatsoever shall be given, &c., for or in respect of any such apprentice, which shall not be truly and fully so inserted and specified in some such indenture, or other writing, shall forfeit double the sum so given, &c. The *penalty* is only for not inserting correctly the sum paid with the apprentice; and if it be not considered that an indenture which is ante-dated, is, on that account, void, the provision, requiring that indentures shall bear date on the day of their execution, is nugatory. Where a statute says that a thing shall be done in a particular manner, it is to be implied, that, unless it be done in that manner, the whole is to be void. Thus in *Slade v. Drake* (a) it is said (b), "The rule is, that affirmatives in statutes that introduce new laws do imply a negative of all that is not in the purview. And therefore, in *Amy Townsend's* case (c), it is adjudged, as it hath been since, that where one comes to a possession by an use out of a state discontinued, so that the entry was not lawful to the cestui que use, such a possession works no remitter, because the statute appoints the possession in the same manner and form (which imports a negative and no other) as are in use. So, the stat. Westm. 2. appoints that the demandant in quod ei deforceat may vouch ac si esset tenens; if in the first action he could not vouch,—as if it

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(a) Hobart, 295.

(b) Ib. 298.

(c) Plowd. 111.

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was a scire fac.—then cannot he vouch in the quod ei deforceat, being demandant. 14 *Hen.* 7, 18.”(a)

*Slade v. Drake* is an old case, but is good authority.

If the rule there laid down be correct, it goes the whole length of the proposition contended for. [*Coleridge, J.* Section 38 provides, that every such indenture or writing shall, within a certain time after the *date or making* thereof, be brought to be *stamped*. Was not the provision with respect to ante-dating made with a view to the protection of the revenue?] The meaning of the provision is explained by 5 *Geo.* 3, c. 46, s. 19. Upon the statute of 8 *Ann.* c. 9, the question might be doubtful. By the 5 *Geo.* 3, c. 46, s. 19, it is declared and enacted, that all printed indentures, (and the indenture in this case is one,) &c., for binding clerks or apprentices, shall have the following notice or memorandum printed under the same: “This indenture, &c., must bear date the day it is executed, and what money or other thing is given or contracted for with the clerk or apprentice, must be inserted in words at length, and the duty paid, &c. &c., otherwise the indenture will be void, the master or mistress forfeit 50*l.*, and another penalty, and the apprentice be disabled to follow his trade or be made free.” This is a kind of legislative declaration, that an indenture of apprenticeship falsely dated is void.

*Armstrong*, contra. The clause which has been referred to, in 5 *Geo.* 3, c. 46, after requiring that a notice or memorandum in the form there given shall be printed under all printed indentures, covenants, &c., for binding clerks or apprentices, thus concludes, “and if any printer, stationer, or other person or persons, shall sell, or cause to be sold, any such indenture, covenant, &c., without such notice or memorandum being printed under the same, then and in every such case such printer, &c.,

(a) II. 14 *H.* 7, fo. 18, pl. 7, per *Keble*, arguendo.

shall for every such offence forfeit the sum of 10*l*." The effect of this clause is merely to impose a penalty on printers and others selling printed indentures not having the required notice. The fact of the legislature requiring that under printed indentures there shall be printed a notice, stating that in a certain case the indenture will be void, does not in any sense amount to a legislative enactment that the indenture shall be void in that case. Suppose after the words "and the apprentice be disabled to follow his trade, or be made free," with which the notice concludes, it had gone on thus, "and be liable to be transported beyond the seas to such place as his Majesty in council shall think fit to direct," that could not have made the apprentice liable to transportation. The provisions of this act are treated by Mr. *Nolan*, in his work on the Poor Laws, as not in any manner affecting the validity of indentures of apprenticeship with reference to questions of settlement (*a*). But it is said, that, under 8 *Anne*, c. 9, indentures of apprenticeship, which are incorrectly dated, are on that account void. By section 39 of that statute, it is enacted, that all such indentures or writings as aforesaid, wherein shall not be truly inserted and written the full sum of money received with or in relation to such clerk, &c., as aforesaid, or whereupon the duties payable by that act shall not be duly paid or lawfully tendered, or which shall not be stamped, or lawfully tendered to be stamped, according to the tenor and true meaning of that act, within the respective times therein limited, shall be void and not voidable, in any court or place, or to any purpose whatsoever. By that section the cases, in which it was intended by the legislature that the indenture, &c. should be void, are enumerated; and as an incorrectness in the date is not mentioned, it follows that a defect of that nature does not avoid the instrument.

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(*a*) 1 *Nolan's P. L.* 521, n. (1).

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LORD DENMAN, C. J.—It is contended that no settlement was gained, because the indenture was avoided by 8 *Anne*, c. 9, and 5 *Geo. 3*, c. 46. By 8 *Anne*, I think the indenture is certainly not avoided under these circumstances. The 35th section of that act imposes a *penalty* upon the master to whom any sum of money is paid &c. for and in respect of any clerk &c., which shall not be truly inserted in some indenture or writing bearing date on the day of execution; but in another section (39) the cases are specified in which the indenture or other writing is to be void; and as the case of ante-dating is not there mentioned, we cannot say that the indenture is void under that statute. By 5 *Geo. 3*, c. 46, it is declared and enacted, that all printed indentures of apprenticeship shall have the notice then given printed under the same. That notice states, that the indenture will be void in certain cases, of which one certainly is the insertion of a wrong date. That is an act for altering the stamp duties upon admissions into corporations and companies, and for further securing and improving the stamp duties in Great Britain; and in order to secure the stamp duties upon printed indentures &c. for binding clerks and apprentices, requires, that the notice shall be printed at the foot of it. But there are no words there which can operate to make the indenture &c. void, in the cases mentioned in the notice.

LITLEDALE, J.—The 35th section of 8 *Anne*, c. 9, applies to impose a *penalty* for inserting a wrong date; but the 39th section enumerates the cases in which the indenture is to be *void*, and this is not one of them. The 19th section of 5 *Geo. 3*, puts people *in terrorem*, as it were, but certainly does not of itself operate to make the indenture void in the cases specified.

Order of Sessions quashed.

1836.

DOE *d.* HIGGS and others v. COCKELL and Wife.

**EJECTMENT** for a messuage in St. Mary, Reading, on a demise by parties described as the churchwardens and overseers of St. Mary, Reading, for the time being.

At the trial before *Alderson, B.*, at the Berks summer assizes, 1834, a verdict was taken for the plaintiff, subject to the following case:

The lessors of the plaintiff were churchwardens and overseers at the time of the demise laid and of the action commenced. A rent of 3*l.* per annum had been paid by the defendants and those who preceded them in the tenancy of the messuage, for many years prior to 39 Geo. 3, c. 12, and by the defendants, since the act, to the successive churchwardens, down to the expiration of the notice to quit hereinafter mentioned. On the 23d March, 1833, a notice to quit was duly served on the defendant *John Cockell*. This notice was signed by the persons who at the time filled the offices of churchwardens and overseers, but who had gone out of office before this action was commenced. The plaintiff called one *Hall*, whose admissibility as a witness was objected to by the defendants. *Hall* stated on the voir dire, that he had small houses in the parish which never had been rated to the poor, and were under the value rated in the parish; that no church rates had ever been demanded or paid in respect thereof; that he had resided in Reading 36 years, but for the last 10 years he had lived 20 miles therefrom, and his houses were occupied by tenants. The objection was overruled; and *Hall* being admitted as a witness, proved, that from 1817 to 1820, inclusive, he had been churchwarden, and had received as such churchwarden the rent of the premises in question from the defendants.

Lenses by the churchwardens of A., in which the demised tenement is described as parcel of the lands of the parish church of A., and payment of rent to them, are *prima facie* evidence that the tenement is parish property.

Nor does it make any difference, that the lenses are expressed to be made by the churchwardens, with the consent and approbation of the vicar and the major part of the aldermen and burgesses, and of the inhabitants and parishioners, and that the leases are indorsed with a memorandum, expressing the consent of certain parishioners, whose names are subscribed.

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The defendants put in a lease, dated the 20th December, 1800, between *Moore* and *Watlington*, wardens of the parish church of St. Mary, Reading, of the first part, *Wm. Blackall Simonds*, of the second part, and *John Lichfield* and *Hunnah* his wife, of the third part, and purporting to be made with the consent and approbation of the Rev. *Charles Sturgess*, vicar of the said church, and also with the consent of the major part of the aldermen and burgesses of Reading and other inhabitants and parishioners, whose names were indorsed thereon, whereby, in consideration of the surrender of a former lease vested in *Simonds*, in trust for *Lichfield* and wife, and of 12l. paid by *Lichfield* and wife to *Moore* and *Watlington*, the messuages granted therein, described as belonging to the said church, were mentioned to be thereby demised to *Lichfield* and wife from Michaelmas then last, for fifty-nine years, yielding and paying unto the said churchwardens and their successors for the time being, wardens of the said church, for the use of the said parish church, the yearly rent of 3l. at Lady-day and Michaelmas, by equal portions. The defendants had come into possession under an assignment of this lease. The assent indorsed on the lease is in the following terms:—"Memorandum. We whose names are hereunto subscribed, the parishioners and inhabitants of the parish of St. Mary, do consent that the within lease be made to the within-named *John Lichfield* and *Hannah* his wife, at such yearly rent and under such covenants and agreements as within expressed. Witness our hands, the 20th day of December, 1800. *Chas. Sturgess*, Vicar; *W. Blandy*, Alderman; *W. B. Simonds*, *Jas. James*, *Fras. Lockey*, *Rich. Harbert*."

For the plaintiff it was contended that this lease was void; that the estate and interest in the premises had vested in the churchwardens and overseers by the opera-

tion of the statute; and that the only interest therein was that of the defendant *John Cockell*, as tenant from year to year, which the notice to quit had determined. The defendants contended that the statute transferred the messuage to the churchwardens and overseers, subject to the lease, and that the lease was confirmed by the acceptance of the rent by the successive churchwardens and overseers, with the assent of the parishioners; and also that the evidence of *Hall* had been improperly received.

*Talfourd*, Serjt., for the plaintiff. *Doe d. Higgs v. Terry*(a) involved the same question, except that no evidence was alleged to have been improperly received.

*Ludlow*, Serjt., for the defendants. There is a distinction between the lease mentioned in this case and that referred to in the case decided last term. Here, the vicar and the major part of the aldermen and burgesses, and others, are consenting parties to the lease.


LORD DENMAN, C. J. (b), and LITLEDALE, J. (c), stated that they were not present when *Doe d. Higgs v. Terry* was argued.

After the Court had conferred together, LORD DENMAN, C. J., said—We are inclined at present to think that there is no distinction between the two cases. You may at present, brother *Talfourd*, confine yourself to the question whether *Hall* ought to have been admitted as a witness.

(a) 5 Nev. & Mann. 556; 3 at the Privy Council.  
Nev. & Mann. Mag. Ca. 385. (c) *Littledale*, J., sat in the  
(b) Lord Denman, C. J., was Bail Court during that term.

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determining  
tenancy.

*Talfourd*, Serjt. It is presumed that the objection to the competency of the witness is, that he, as a proprietor of houses, is interested in increasing the funds of the parish, and relieving himself from liability as a parishioner.

Assuming that the rent of the messuage would be applied in reduction of the parish rates, still the witness has no interest in the event of the suit (*a*). The messuage is let for 9*l.*, which is paid to the churchwardens and overseers, but it does not appear that it is of greater value than the rent reserved, or that the churchwardens and overseers could, by putting an end to the present tenancy, subsequently obtain a higher rent. The case does not shew (*b*) that this was not a rack rent; and as the defendants were seeking to exclude the witness, it was incumbent upon them to shew distinctly that he was interested in the event (*c*).

Supposing that it is to be taken that the messuage is of greater value than the rent reserved, the witness was competent at common law; and if not, he was rendered competent by 54 *Geo. 3*, c. 170, s. 9.

Whether liability to be rated renders witness incompetent at common law.

I. *Liability* to be rated is no objection to the competency of a witness: *Rex v. Kirdford* (*d*), recognized in *Marsden v. Stansfield* (*e*). [Lord Denman, C. J. Before

(*a*) By the decision of this Court in *Bent v. Baker*, 3 T. R. 27, the objections to the competency of a witness on the score of interest, were settled and reduced to two heads; first, that the witness is interested in the event of the suit; secondly, that the judgment will be evidence for or against him. The latter ground of objection is much narrowed by 3 & 4 *Will. 4*, c. 42, s. 26; see *Woolway v. Rowe*, 3 Nev. & Mann. 849; 1 Adol. &

Ellis, 114; *Bailiffs of Godmanchester v. Phillips*, 6 Nev. & Mann. 211.

(*b*) Otherwise than by the premium of 12*l.*, ante, 582.

(*c*) *Qu.* whether the costs of the action would be a sufficient interest to disqualify, see *Jones v. Brooke*, 4 Taunt. 464.

(*d*) 2 East, 559.

(*e*) 1 Mann. & Ryl. 669; 1 Barn. & Cressw. 815; 1 Mann. & Ryl. Mag. Ca. 358.

the statute, it used to be the practice to leave a party out of the rate in order to render him a competent witness.]

II. Assuming that the witness was incompetent at common law, he was clearly rendered competent by 54 Geo. 3, c. 170, s. 9. *Marsden v. Stansfield* is an authority for this, as also for the competency of the witness at common law. That was an issue in K. B. to try whether a messuage was situated within a chapelry, and a witness was called who occupied ratable property in the chapelry. The Court held that the witness was competent at common law, and that if he had been incompetent at common law, he was rendered competent by 54 Geo. 3, c. 179. That statute provides that no person rated or liable to be rated to any rates or cesses of any district, shall be deemed to be by reason thereof an incompetent witness for or against such district *in any matter relating to such rates or cesses*. If this be a matter relating to rates and cesses, the witness is rendered competent by the statute; if not, then the witness is competent at common law. In *Meredith v. Gilpin* (a) the question was, whether certain land belonged to the defendants as overseers; and the Court held that rated inhabitants were competent witnesses by virtue of 54 Geo. 3, c. 170. That case was questioned, but not overruled, in *Orenden v. Palmer* (b). In *Rex v. Hayman* (c) the defendant was indicted for the non-repair of a bridge, upon a liability *ratione tenuræ*; and it was held that this was a case within the scope of the statute, and that inhabitants were competent witnesses. *Heudebourck v. Langton* (d) was an action of debt by the new waywarden against his predecessor in office, for the penalty under the Highway Act of 13 Geo. 3, c. 78, (s. 48.)

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ness rendered  
competent by  
54 Geo. 3,  
c. 170, s. 9.

(a) 6 Price, 146.

(b) 2 Barn. &amp; Adol. 236.

(c) 1 Mood. &amp; Malk. 401.

(d) 1 Mood. & Malk. 402, in  
the note; but see the report of  
this case in 3 Carr. & P. 566.

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for not accounting. Lord *Tenterden* held that the statute rendered the inhabitants competent witnesses for the plaintiff, although their evidence would tend to increase the funds, in relief of the rates.

*Ludlow*, Serjt. (with whom was *Tullbot*), for the defendant. This is a lease granted, as appears on the face of it, under a *power*. It is not a mere lease by the churchwardens and overseers, but the vicar and other parishioners are *consenting* parties. As the lease is stated to be made with the consent of the vicar, aldermen, and other persons, it is to be presumed that their consent was *necessary*, which could only be made requisite by a *power*. [Lord *Denman*, C. J. Can we *presume* any such power?] Any presumption may be made consistent with the lease.

First point.

*Hall* is an incompetent witness at common law, because he has a direct interest in the event of the suit, the object of which is to increase a fund to be applied in discharge of the liabilities of the parish. The witness is equally incompetent, whether the result of the suit is to increase a fund in which he, as a parishioner, participates, or to increase a fund so as in fact to relieve him from the payment of money which he would otherwise be called upon to pay. The witness was the occupier of freehold land in the parish, and although he did not reside in the parish, he was ratable. Even supposing the tenements not to be ratable to the poor, still the witness was liable to the church rate; and as the churchwardens and overseers hold the land in trust not only for the relief of the poor, but for the purposes to which the church rate is applicable, a recovery by the plaintiff would increase the fund applicable to those purposes, and consequently diminish the witness's share of the contribution for those purposes.

But it is said that the 54 Geo. 3, c. 170, s. 9, renders the witness competent, as this is a matter *relating to a rate or cess*. This does not relate to a rate. An appeal against a rate may be said to relate to a rate, but not ejectment for the recovery of a messuage. *Meredith v. Gilpin*,—cited to shew that this is a matter relating to a rate,—was overruled by *Oxenden v. Palmer*. The two cases are not reconcilable. *Rex v. Bondgate in Auckland(a)* is an express authority that the rated inhabitants of a district indicted for the non-repair of a highway, are not rendered competent witnesses for the defence by 54 Geo. 3, c. 170.

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 Second point.

*Talfourd*, Serjt., in reply, was stopped by the Court.

LORD DENMAN, C. J.—The distinction which has been attempted to be made between this case and that decided (and in my opinion rightly decided) last term, has no foundation. The churchwardens and overseers demised the messuage: It must be taken that they had an interest; and it is clear they had no interest except in their character of churchwardens and overseers. They had therefore no power to let except from year to year; and due notice to quit was given.

The plaintiff is therefore entitled to recover, unless *Hall* was an incompetent witness. It does not appear that *Hall* had any interest in the event of the suit. The rent reserved may have been the rack rent; so that the whole of the argument for the defendants wants a foundation. That fact distinguishes this case from those which have been cited for the defendants.

In ejectment brought to determine a tenancy at rack rent, a person interested in the reversion is not an incompetent witness for the plaintiff, until it is shewn that he is interested in putting an end to the tenancy.

LITLEDALE, J.—The principal question in this case was determined by the case which was disposed of last term. A distinction is sought to be raised, on the ground

(a) 1 Adol. & Ellis, 744.

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that here the vicar, aldermen, and burgesses are consenting parties to the present lease. The vicar and the major part of the aldermen and burgesses, and others the inhabitants and parishioners, are not *parties* to the lease. It purports to be made with their *consent*, and from this circumstance we are called upon to presume that the lease was executed by virtue of a *power*. No such presumption arises. I should assume, on the contrary, that it was merely wished to have the consent of the parishioners. *Oxenden v. Palmer* was an action to establish a right to take shingle to repair the highways within the parish. This is a mere dispute between landlord and tenant. The property belongs to the churchwardens and overseers; and it is immaterial to the witness whether the property be occupied by the *servants* or by the *tenants* of the churchwardens and overseers. To render a witness incompetent, it should plainly appear that he will derive some benefit from the event of the suit(*a*). It does not appear that *Hall* had any interest in disturbing the relation of landlord and tenant between the lessors of the plaintiff and the defendants; and therefore he was, in my opinion, a competent witness.

WILLIAMS, J.—There is nothing in this case to shew that any one had any interest in the property except the churchwardens and overseers.

Enough does not appear to satisfy us that *Hall* had an interest in the event of the suit. In *Marsden v. Stansfield* it is laid down by *Bayley, J.*, that the burden of proof lies on the party who objects to the competency of the witness. It does not follow that because the churchwardens and overseers succeed in this ejectment, the funds of the parish will be increased so as to relieve individuals liable to contribute to those funds.

Judgment for the plaintiff.

(*a*) *Ante*, 584, n. (*a*).

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## EASTER TERM,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

## The KING v. The Inhabitants of IGHTHAM.

AN order of removal from the parish of Ightham, in Kent, to the parish of Sundridge, in the same county, was quashed, upon appeal, subject to the following case:

The respondents proved a settlement by birth in Ightham. The appellants set up a subsequent settlement in Sundridge, under the following circumstances:—*Wm. Webb*, the brother of the pauper, *John Webb*, worked with *Wm. Wright*, a carpenter, residing at Ightham, for three years, under a verbal contract of apprenticeship, and in 1804, when the pauper was about twenty years old, applied to *Wright* to take the pauper in his place. *Wright* answered “no,” that he would take no more three-years’ apprentices unless they would agree to work on his land as well as at the carpentry business. “I will have no more apprentices for three years, unless he is agreeable to do other work as well; I will take him to do work as a servant.” *Wright* occupied three acres of hop ground. *Wm. Webb* assented, and it was agreed that the pauper should live with *Wright* for three years, to learn the business of a carpenter, and do any other work he required him to do; to be paid for the first year 9s. a week, the second 10s., and for the third 11s.; and if the pauper did any over-work, he was to be paid for it in addition, according to his rate of wages at the time.

*A.*, a carpenter and occupier of land, is applied to by *B.*, who wishes to succeed *C.*, as an apprentice to *A.* *A.* says he will take no more apprentices, unless they will work on the land as well as at the trade, and that he will take him to do work as a servant. It is agreed that *B.* shall live with *A.* three years, to learn the business of a carpenter, and do any other work that shall be required by *A.*, who is to pay him certain weekly wages, and also for over-work.

The question, whether this agreement constituted a contract of

apprenticeship or of hiring and service, ought to be decided by the sessions. But where the sessions, having decided that it is a contract of hiring and service, granted a special case, the Court, upon the facts found as above, reversed their decision, holding that the agreement was an imperfect contract of apprenticeship.

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*Wright* added, that the pauper might have Sunday to himself, if he asked leave. The pauper entered *Wright's* service in pursuance of this agreement, and served the three years, boarding and lodging at his own expense, with a journeyman.

*Bodkin*, and *Erskine Perry*, in support of the order of sessions. The sessions have found that this was a contract of hiring and service. That finding is conclusive. In *Rex v. St. Andrew the Great, Cambridge (a)*, it was made a question of fact at the sessions, whether there had been a hiring and service for a year, in the appellant parish. The sessions confirmed the order of removal, subject to the opinion of this Court. It was held that this amounted to a finding by the sessions that there was a hiring and service for a year, and that such finding ought not to be disturbed, if there were any premises to warrant it. In *Rex v. Great Wishford (b)*, it was determined that where upon a special case the sessions state the facts and draw their conclusion, this Court will not disturb the finding, unless it appear that the evidence was *contrary* to the finding, or that there was *no* evidence to support it. [Lord *Denman*, C. J. The sessions have here stated all the facts, upon which we must give our opinion. *Rex v. Great Wishford* was a question of fact: This is a question of law.]

The facts stated in the case shew a contract of hiring and service. The pauper was proposed to the master to succeed his brother, who had served as an apprentice, and the master's answer is, "I will take no more three-years' apprentices." The pauper subsequently agrees to the master's proposal to do work as a servant. These cases must be decided by their particular circumstances,

(a) 3 Mann. & Ryl. 374; 8 & Ryl. Mag. Ca. 19.  
 Barn. & Cressw. 664; 2 Mann. (b) *Ante*, 367.

and not by general rules. The question is, what was the primary object of the parties. Here, it clearly was to engage a *servant*. This is evident from the amount of wages to be paid by the master. In the majority, if not in all of the cases in which the contract has been considered as a defective apprenticeship, money has been contracted to be paid to the master for teaching. In this case, the full wages of an agricultural servant were to be paid by the master. *Rex v. Combe*(a), and *Rex v. Edingale*(b), will be relied on by the other side, but both those cases are distinguishable from the present. In *Rex v. Combe*, it was suggested to the pauper that it would be better for him to learn a trade instead of going to service. He had therefore an alternative, and he chose to enter into a contract of apprenticeship. Here, there is an ambiguity in the statement as to the character in which the pauper entered into the service. In *Rex v. Edingale*, the pauper was only employed in the trade to which he was apprenticed. This case resembles that of *Rex v. Hitcham*(c). There the pauper let himself for one year to his brother, a carpenter, at Hitcham. He was to receive no money by way of wages, but his brother was to teach him as much as he could, during the year, of the trade of a carpenter, and was to provide him with board and lodging: and the pauper was to do all his brother's business upon the farm which he occupied, and any other work which his brother ordered him:—It was held that this was a contract of hiring and service. It has been held, that although it be an ingredient in the contract, that one party shall be taught by the other, that circumstance will not necessarily make it a contract of

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(a) 2 Mann. & Ryl. 30; 8  
Barn. & Cressw. 82; 1 Mann. &  
Ryl. Mag. Ca. 283.

(b) 10 Barn. & Cressw. 739.  
(c) Burr. S. C. 489.

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apprenticeship (a). Here, the pauper was to work on the hop ground, which would require incessant toil.

*Deedes, contra.* This case is stated by the sessions expressly to raise the question, whether this was a contract of hiring and service, or a defective contract of apprenticeship. The law is thus laid down by *Taunton, J.*, in *Rex v. Crediton (b)*,—"I take the true distinction in these cases to be this: where teaching on the part of the master, or learning on the part of the pauper, is not the primary but only the secondary object of the parties, that will not prevent (where work is to be done for the master) the contract being considered one of hiring and service. In all the cases cited, where the contract was so considered, it appeared that the pauper had agreed to work for his master, and the master undertook to teach him the particular trade in which he was conversant, but the teaching and learning were *incidental*, and therefore it was held to be a contract of hiring. But where teaching and learning are the *principal* objects of the parties, though there was a service, the contract is considered to be one of apprenticeship." In this case, apprenticeship clearly was the *primary* object of the parties. *Wm. Webb*, the brother, had been apprenticed to *Wright*, and the pauper was to take his place. *Rex v. Hitcham* is distinguishable. In that case, hiring and service were the essence of the contract. The master was to teach the servant as much as he could of the business in lieu of wages. Assuming that the sessions have found this to be a contract of hiring and service, yet if that finding be manifestly wrong, this Court will correct it. This

(a) *Rex v. Burback*, 1 Maule & Selw. 370. See also *Rex v. Eccleston*, 2 East, 298; and *Rex v. Little Bolton*, Cald. 867.  
 (b) 2 Barn. & Adol. 498.

was done in *Rex v. St. Margaret's, Lynn* (a), *Rex v. Tedford* (b), and *Rex v. Newtown* (c).

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LORD DENMAN, C. J.—This, in my opinion, is a defective contract of apprenticeship. The pauper was to live with *Wright* three years, to learn the business of a carpenter, and do any other work he required him to do. I think the master might have been *sued* for not teaching the pauper the business of a carpenter.

LITLEDALE, J.—The pauper was the brother of a former apprentice: the master says, I will have no more apprentices for three years, unless he is agreeable to do other work as well;—I will take him to do work as a servant. The question then is, whether the working as a servant was subsidiary to the apprenticeship. The brother assented to what the master said, and it was agreed that the pauper should live with the master for three years, to learn the business of a carpenter, and do any other work he required him to do, for which he was to be paid. It is not unusual for a master to pay his apprentice. Upon the whole, this must be taken to be a contract of apprenticeship.

PATTESON, J.—I think this is an imperfect contract of apprenticeship. It appears that on the first application by the pauper's brother, the master said he would take no more apprentices unless they would work on the land as well as at the carpentry business;—and the pauper, as I understand the case, subsequently consented to work as a servant, as well as an apprentice. The pau-

(a) 9 Dowl. & Ryl. 160; 6 Barn. & Cressw. 97; 4 Dowl. & Ryl. Mag. Ca. 260.

(b) Burr. S. C. 57; 2 Str. 1014.  
(c) *Ante*, vol. ii. 226; 3 Nev. & Mann. 306; 1 Adol. & Ellis, 238.

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per's object, however, was to learn, and the master undertook to take him as a servant and teach him the business of a carpenter.

COLERIDGE, J.—This case should not have come here. The sessions should have found whether this was a contract of hiring and service, or a defective apprenticeship. In *Rex v. Great Wishford* there was evidence to support the finding of the sessions. I agree with the rest of the Court, and I would remark, that it would be better if counsel did not press for a case on questions of this description.

Order of Sessions quashed.

The KING v. The Churchwardens of the Parish of  
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The 14th section of 59 G. 3, c. 134, which authorizes churchwardens to borrow money upon the credit of the church-rates, for defraying the expense of repairs to the church, contemplates future expenses only, and not such as have already been incurred.

When money is borrowed by churchwardens, under

*R. v. RICHARDS* had obtained a rule, calling upon the churchwardens of Dursley to shew cause why a mandamus should not issue, commanding them to make certain payments therein specified to one *Charles Bruce Warner, Esq.*, or to raise by rate a sum sufficient for that purpose. From the affidavit, and the documents annexed to it, upon which the rule was obtained, the following facts appeared.

In the years 1824, 1825, and 1826, certain repairs had been done to the parish church of Dursley, at an expense of 1585*l.* 12*s.* 7½*d.* At a vestry held on the 30th day of November, 1831, it was resolved, that as 413*l.* 3*s.* 9½*d.*, part of the above sum, still remained undischarged, the sum of 63*l.* 3*s.* 9½*d.* should be raised and this statute, the instalments of "not less than ten per cent. of the principal sum borrowed" ought to be *annual*.

paid in part of the said sum of 413*l.* 3*s.* 9½*d.*, and that the further sum of 350*l.* should be borrowed upon the credit of the church-rate, under the provisions of 59 *Geo.* 3, c. 134 (*a*), and that the churchwardens should apply to the bishop and the incumbent for their consent to the proposed scheme. An application was accordingly made to the bishop and the incumbent, and their consents duly obtained. On the 27th February, 1832, the required loan was obtained from Mr. *Warner* by Messrs. *Bloxsome* and *Hicks*, the then churchwardens of Dursley, and, in order to secure the repayment of it to him, a deed of charge, under their hands, bearing date on that day, was executed. The deed, after reciting the above facts, provided that the said sum of 350*l.* should be repaid by annual instalments of 50*l.* each, on the 27th February in each and every year, up to and including the year 1839, and that interest at the rate of five per cent. should be paid by equal half-yearly payments on the 27th August and the 27th February, in each and every year. It then declared, that the said principal and

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(*a*) Intituled "An Act to amend and render more effectual an act passed in the last session of parliament for building, and promoting the building of additional churches in populous parishes."

The 14th section enacts, "that it shall and may be lawful for the churchwardens of any parish, with the consent of the vestry, or persons possessing the powers of vestry, and with the consent of the bishop and incumbent, and they are hereby authorized and empowered to borrow and raise, upon the credit of the church rates, or of any rates

made under the said recited act, or this act, of any such parish, such sum or sums of money as shall be necessary for defraying the expense of repairing any churches or chapels; and they are hereby empowered and required, in any case in which such money shall have been borrowed, to raise by rate a sum sufficient, from time to time, to pay the interest of the money so borrowed, and not less than ten per cent. of the principal sum borrowed, out of the produce of such rates, until the whole of the money so borrowed shall be repaid."

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interest were, and should continue to be chargeable and charged upon the church rates then raised or thereafter to be raised in the said parish, until they were fully repaid. A bond, of the same date with the deed, was also executed to Mr. *Warner* by Messrs. *Bloxsome* and *Hicks*, and seven other persons, who were at that time parishioners of Dursley, in the penal sum of 700*l*. By the condition of this bond, after reciting the deed of charge, and that, upon the treaty for the loan, it was agreed between the obligee and obligors, that such a bond should be executed, it was provided, that each of the obligors should become severally and respectively liable for the due payment of the said sum of 350*l*. and interest, in the manner specified by the deed, but only to the extent of one ninth part of the whole sum, or such part of it as should remain due. The instalment which became due in February, 1833, was duly paid, and also all interest up to the 27th August, 1834. Default having been made in payment of the next instalment, an application was made by Mr. *Warner's* solicitors, to Messrs. *West* and *Bishop*, the then churchwardens of Dursley, calling upon them to make a rate for the purpose of raising and paying the sum then due to their client. The affidavit stated the deponent's belief that such a rate was made, but that it proved unproductive. On 29th July, 1835, no money having been paid to Mr. *Warner*, a second application was made by his solicitors to the same churchwardens, but without effect.

The affidavits, in answer, which were made by *Bishop*, stated, among other facts, that upon his calling upon the rate-payers of the parish to pay the rate made in 1832, the principal part of them refused to pay it, and expressed their determination to resist it, on the ground that it was made for the purpose of paying a debt incurred in the years 1824 and 1825, previously to many of them be-

coming occupiers or possessors of property in the parish, by certain of the then inhabitants, in new-pewing and ornamenting the church, and not for or towards its necessary repairs. It was further stated, that the rate referred to in the deed of charge, and expressed to have been made upon the 30th of November, 1831, had never been collected, and that *Hicks*, one of the preceding churchwardens, when required to pay his share of the rate of 1832, refused, on the ground that the one granted to him in November, 1831, had not been yet collected.

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*Thesiger* and *Busby* now shewed cause. In the first place it is submitted, that the motion for a mandamus will not lie, because another and a better remedy is open to the party applying for it. It is clear, that when another remedy exists, a mandamus will not lie. The only case in which the Courts have held otherwise is *Rex v. The Severn and Wye Railway Company* (a). That case, however, is distinguishable from the present, and yet, even there, *Abbott*, C.J. said, that he had entertained considerable doubts, during the discussion, whether the Court ought to grant a mandamus to compel the doing of an act the omission to do which might be prosecuted by indictment. Here, the party applying has taken a bond from the two churchwardens and seven other parishioners. [*Coleridge*, J. That is no remedy against the rate-payers.] Certainly not; but it is a remedy by which the applicant can recover the money advanced by him. First objection.

In the second place, even supposing that a mandamus will lie, it is submitted that the Court will not grant it in this instance, lest they should subject the churchwardens to the risk of an action. It is stated, that they Second objection.

(a) 2 Barn. & Ald. 646.

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have already made an attempt to collect the rate, and that the parishioners have refused payment. Any attempt to enforce the payment summarily, would expose the churchwardens to an action. Several cases of that kind have already occurred, and particularly of late. [*Little-dale, J.* They are not called upon to issue a distress-warrant; they are merely required to pay off the money, or to levy a rate.] The first part of the rule, it is submitted, is perfectly unfounded. The only question which can arise is, whether this Court will compel the churchwardens to raise the money by *levying a rate*. In *Rex v. Hall and Dyer (a)*, this Court refused to compel magistrates to act, when it was not clear that the act which they were required to do was legal. The main point for discussion therefore is, whether it is competent to churchwardens to raise money for the purpose of defraying the expenses of repairs to the church which have been completed several years previously. And it is submitted, that they are not at liberty to raise money for such a purpose, either by a loan or by a rate. If they were so, the consequence would be, that after a lapse of five or six years, the then existing parishioners might have the whole burden of antecedent repairs thrown upon them. No doubt, if in 1824 the amount of necessary repairs had been ascertained, and the money had been raised upon loan, before its expenditure, the present inhabitants would have been liable. The language of the 14th section of the stat. 59 *Geo. 3*, c. 134, which authorizes the borrowing of "such sum or sums of money *as shall be necessary*," shews that the legislature contemplated *prospective* repairs only. It is apprehended to be the duty of the churchwardens, in a case of this kind, to ascertain the probable amount of the required

(a) 4 *Nev. & Mann*. 516; 2 *Adol. & Ell*. 606.

repairs, and then to obtain the consent of the vestry, the bishop, and the incumbent. When that has been done, they may make a rate, or raise the money by way of loan, without any further consent of the parishioners; *Rex v. The Churchwardens of St. Mary, Lambeth* (a). But if the churchwardens might raise the money six years after the repairs were completed, why might they not do so twelve or twenty years afterwards? Where must the line be drawn? The reasonable mode of proceeding is, to ascertain the requisite amount, and to obtain the necessary consent before making the repairs, and then to make the rate. It would be a great inconvenience and hardship upon the subsequent inhabitants of a parish, if the churchwardens could at any time raise money to defray by-gone expenses.

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*R. V. Richards*, contra. As to the first objection,—It is submitted that there is no ground for saying, that the taking a collateral security from private individuals, by way of remedy to be adopted in the event of the rates failing, precludes the obligee from having the benefit of a mandamus. First point.

Then, as to the second point,—To prevent this Court from issuing a mandamus, there must be reasonable ground for apprehending that the consequence of such a step will be to expose the party complying with the mandate to an action, of the result of which doubt may be entertained. And the Court will always inquire, with a view to ascertain this. The real question, (which is one of general importance and has already been raised in several parishes,) is, whether, in 1832, the churchwardens, with the consent of the vestry, incumbent, and ordinary, had the power to bind the parishioners; and Second point.

(a) 3 Barn. & Adol. 651.

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it is submitted that the clause in question gave them that power. No doubt there will be an inconvenience whichever way the Court may decide. On the one hand, this hardship may arise, that the parishioners of the present time may have to pay for matters with which they had nothing to do; and, on the other hand, the whole burden may be thrown upon those who were in the parish at the time, although the repairs done may have been of a substantial and *permanent* nature. For the purposes now under discussion, the parish must be considered as a quasi corporation. In order to protect it from improper charges, the consent of the vestry, the bishop, and the incumbent, must first be obtained. Even assuming that money cannot legally be borrowed for by-gone repairs, the party lending has nothing to do but to see that the necessary consent has been obtained from the proper parties. He is not bound to see that the money is applied specifically to repairs; and it is therefore no answer to his demand, that the money has been improperly expended. The effect of discharging this rule will be, to prevent any person from lending money upon the security of the rates. It will throw upon the lender the burden of seeing that the money is well applied, as well as the risk of its being misapplied. It does not appear that there has been any decision on the point since the case cited of *Rex v. The Churchwardens of St. Mary, Lambeth*. The whole question, however, turns upon the 14th section of the stat. 59 Geo. 3, c. 134, in the language of which, it is submitted, there is nothing to prevent the levying of such a rate as is required by this rule. The words are—"which shall be necessary for defraying the *expense* of repairing, &c." The term "*expense*," may mean either a by-gone or future outlay.

*Cur. adv. vult.*

Lord DENMAN, C. J., on a subsequent day delivered the judgment of the Court as follows:—This was an application for a mandamus to be directed to the churchwardens of Dursley, commanding them to make a rate and take all necessary steps for the payment to *Charles Bruce Warner*, of the instalments remaining due on a sum of 350*l.*, which had been borrowed for the purpose of defraying the expenses of repairing the parish church, and charged upon the church rates under the authority of the 59 *G. 3*, c. 134, s. 11.

It appeared, among other facts, that the repairs in question had been done in the years 1824, 1825, and 1826, at an expense of 1500*l.*; that in 1832 the sum of 350*l.* remaining unpaid, the applicant had been asked to lend that sum, and had done so, receiving a deed of charge, regular in form, and with the necessary consent of the bishop, incumbent, and vestry; one instalment of the principal and interest had been paid in 1833, and the interest to August, 1834.

It was objected, on shewing cause, that the section in question does not authorize the borrowing of money and charging the rates retrospectively. We have considered this objection, and although the words of the statute are in this respect general, we are of opinion that it must prevail.

It is a general rule with respect to parish rates, founded on obvious principles of policy and justice, that they are not to be made retrospectively. The payers being a fluctuating body, nothing, generally speaking, is more just or more likely to conduce to economy, than to hold that they who create a charge shall themselves bear it. The statute has, to a certain extent, modified the general rule, and the churchwardens are authorized, with the sanction of the vestry, bishop, and incumbent, to

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borrow, on the credit of the rates, such sum of money as shall be necessary for defraying the expense of repairing the church, and they are then empowered and required to raise by rate a sum sufficient, from time to time, to pay the interest, and not less than 10 per cent. of the principal, until the whole of the money so borrowed shall be repaid.

It appears to us that all the provisions point clearly to the limits of departure from the general principle above stated. The consent of the incumbent and bishop appear to have been thought necessary, in order to see that the repairs should be of that onerous and permanent nature which might properly be thrown in part on the payers of succeeding years: Their consent, and that of the vestry, have the effect also of securing the parish from an improvident outlay: and finally, the provision, that the principal and interest shall be paid in ten instalments, (which ought, in our opinion, to be annual,) secures the participation of the existing rate-payers in the discharge of the loan, and prevents it from becoming a burthen at any indefinite period on their successors.

The obvious purposes of the act, so necessary to prevent abuses of the power given by it, can only be secured by an adherence to the general rule stated above, in all particulars not specially provided for by the clause. We are therefore of opinion, that the rate now sought to be imposed would not be authorized by the statute, and of course that the present rule must be discharged.

Rule discharged.



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## The KING v. CHARLES HEATH (a).

AT the quarter sessions held at Petworth, in the county of Sussex, on the 8th January, 1835, an order was made on *Charles Heath*, of the parish of Stopham, as the father of a male bastard child, to reimburse the parish of Stopham for the maintenance of the child, under the 4 & 5 Will. 4, c. 76,—subject to the opinion of this Court upon the following case:

*Eliza Penfold*, of the parish of Stopham, single woman, was, on the 16th August, 1834, delivered of a male bastard child, which became, on the 29th September, in the same year, chargeable to Stopham, and continued so until the making of the said order. The quarter sessions next after the 29th September, 1834, was held at Chichester, for the said county, on the 15th day of October, in the same year. No application was made by the overseers of Stopham for an order on *Charles Heath*, in respect of the said bastard child, until the quarter sessions held at Petworth, on the 8th January, 1835, nor was any notice served on him by the overseers of Stopham, of any intention to make such application, until the 9th December, 1834. It was objected, on the part of the said *Charles Heath*, that the sessions held on the 8th January, 1835, had no jurisdiction to hear such application. This objection was overruled. The Court also considered that it was not necessary for the overseers to shew that they had made diligent inquiry as to the father of such child, previous to the October sessions; and they held, that though the child became chargeable on the 29th September, still that the applica-

An application for an order, under 4 & 5 Will. 4, c. 76, for the maintenance of a bastard child, which had become chargeable, sixteen days before the October sessions, was made to the Epiphany sessions, without good reason shewn why the application had not been sooner made: Held, that the sessions had no jurisdiction to entertain it.

*Quere*—whether the application must, in all cases, be made to the first sessions after the child becomes chargeable.

(a) This case was decided in Trinity term, 1836. It has been inserted out of its proper order in consequence of the great importance of the decision to Courts of Quarter Sessions.

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tion to the Epiphany quarter sessions was in sufficient time under the provisions of the statute.

*Darby*, against the order of sessions. It was incumbent upon the overseers to make their application either at the sessions next after the child became chargeable, or else to shew that they had made diligent inquiry after the father of the child, and had been unable, up to the time when those sessions were held, to discover either his name or his residence. Sect. 72 of the Poor Law Amendment Act, requires the overseers, after diligent inquiry as to the father, to apply to the *next* general quarter sessions of the peace after the child has become chargeable. The 73d section enacts, that no such application shall be heard at such sessions, unless fourteen days' notice shall have been given; and in case there shall not, previously to such sessions, have been sufficient time to give such notice, the *hearing* of such application shall be deferred until the next ensuing general quarter sessions. The legislature therefore manifestly makes a distinction between the application and the hearing, and requires the *application* to be made to the next sessions after the chargeability, even though sufficient time should not have elapsed for giving the required notice. In *Rex v. The Justices of Oxfordshire (a)*, it was laid down by Coleridge, J., that the application must be made to the sessions next after the birth of the child and its chargeability, and that the provision that the application should be made after diligent inquiry as to the father, was probably directory; and that learned judge laid it down as a general rule, that the application must be made to the next sessions. It would be exceedingly unjust if the overseers were allowed the full period of seven years to make an application of this description. Such, however,

(a) *Post*, 610.

is the effect of the decision of the sessions in the present case; for that Court held that it was not necessary for the overseers to shew that they had made inquiry as to the father of the child, previously to the October sessions, and that although the child became chargeable in September, yet that the application was in sufficient time if made in January. Whether the application is to be made at the next sessions after the child becomes chargeable,—or after the child has become chargeable and the name of the father has been discovered,—or after the chargeability of the child and the discovery of the father, and also the discovery of corroborative evidence,—this order of sessions must be quashed, as it does not appear that diligent inquiries were made by the overseers before the next sessions.

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*W. H. Watson*, in support of the order of sessions. The argument on the other side requires an impossibility, in that the overseers are, according to the argument, to apply for an order against a person who is not known to them. In the present case, it does not appear that the overseers had ascertained who the father was until after the October sessions. It cannot be assumed that the father was known to the overseers in sufficient time to enable them to give him fourteen days' notice, since two days only elapsed before the commencement of the fourteen days, and it was only during those two days that the overseers had time (in the words of the act) to make diligent inquiry. This case is distinguishable from *Rex v. The Justices of Oxfordshire*, as there the father was known previously to the Michaelmas sessions, and the overseers went to those sessions for the purpose of making the application, but finding that it was necessary to have corroborative evidence they abandoned their intention, and afterwards made application to a subse-

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quent sessions. The enactment as to the period in which the application is to be made is directory only. Assuming, however, that the enactment is mandatory, the language of the act may be referable to a continuing chargeability, and the period within which the application must be made ought to be computed from the time when relief was last given to the child. The 73d section provides, that whenever an application shall be heard, the costs of the maintenance of the child, in case the Court shall think proper to make an order, shall be calculated from the birth of the child, if such birth shall have taken place within six calendar months previous to such application being heard; but if the birth shall have taken place more than six calendar months previous to such application being heard, then from the day of the commencement of six calendar months next preceding the hearing of such application. The legislature therefore contemplated a case where a child has been chargeable more than six calendar months previously to making the application. [Lord *Denman*, C. J. The appeal may be respited.] The only respite allowed by the act is, where there has not been sufficient time to give fourteen days' notice to the person intended to be charged with being the father of the child. [Lord *Denman*, C. J. There must be authority to respite. The 73d section does not take away the power of deferring the hearing of applications on proper occasions. *Putteson*, J. The first sessions after the child became chargeable were in October. If you say that the January sessions were the first practicable sessions, it is for you to shew that.] The fact was, it is believed, that inquiry had been made, and that the father could not be discovered.

LORD DENMAN, C. J.—The objection was taken in this case, that the Court of Quarter Sessions had no

jurisdiction to hear the application of the overseers. Whether or not the Court had jurisdiction, depends on the 72d section of 4 & 5 *Will.* 4, c. 76. That section declares, that where an illegitimate child becomes chargeable to any parish, the overseers may, if they think proper, after diligent inquiry as to the father of such child, apply—not to the quarter sessions of the peace generally, but—to the *next* general quarter sessions of the peace. It is reasonable and just that there should be some limitation. The legislature evidently intended that the application should be prompt, lest the overseers should defer the application until the party charged had lost all means of proving that he was not the father of the child. Whether the period of limitation is to begin from the time when the child becomes chargeable, or the father is discovered, or after diligent inquiry as to the father, the Court of Quarter Sessions had not, on any supposition, jurisdiction in this case.

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LITLEDALE, J.—I am not without doubt; but, upon the whole, I am disposed to think that this 72d section requires the application to be made to the first sessions. Whether that is the sessions next after the child becomes chargeable, or next after the father is ascertained, it is not necessary now to determine. The words of the act are, that when any child shall be born a bastard, and shall become chargeable to any parish, the overseers may, if they think proper, after diligent inquiry as to the father, apply to the *next* general quarter sessions of the peace. I am rather disposed to think that the application ought to be made to the first sessions after the child becomes chargeable. It has been urged, that unless the father is known, it is impossible to make the application to the next sessions. The words of the statute are however plain, and we are not to put a forced

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construction upon plain and intelligible language. If the act is not sufficiently explicit, it ought to be amended. The sessions had, in the present case, no jurisdiction. Notice of the intended application was not given to *Heath* until the 9th of December: The child was born on the preceding 16th of August, and became chargeable on the 29th September. It is not stated when the overseers knew who the father was, and it does not appear that they did not know him shortly after the birth of the child, and fourteen days before the October sessions, so as to be in a situation to apply to those sessions for an order of maintenance.

PATTESON, J.—I do not see how to avoid the construction put upon the 72d section, by my lord and my brother *Littledale*. The words are plain, and we have no right to attach a meaning to those words different from that which they ordinarily bear. These are the words of the statute,—“when any child shall hereafter be born a bastard, and shall by &c. become chargeable to any parish, the overseers may, if they think proper,” (and “if they think proper” means that they are not bound to make the application at all,) “after diligent inquiry as to the father of such child, apply to the next general quarter sessions of the peace.” This is plain and intelligible language. The child in the present case was chargeable on the 29th of September, and the sessions were held on the 13th of the following October. Those were *primâ facie* the sessions at which the application should be made. This construction is fortified by the next section, which provides that if there be not sufficient time, previously to such sessions, to give the person intended to be charged as the father of such child, fourteen days’ notice, the *hearing* of the application shall be deferred to the next sessions. This 73d

section, however, is relied on as shewing that by the expression "next sessions," is meant the first practicable sessions. Suppose a child was born and became chargeable on the 12th of October, and the sessions were held on the 14th, it may be that the overseers are not bound to make the application to those sessions. In the present case there was sufficient time to give fourteen days' notice, and whatever may be the effect of the statute where there are not fourteen days between the birth and the sessions, that is immaterial to the present question. In the present case, at all events, it lay upon the overseers to shew by evidence why they did not make their application at an earlier period. It is objected that there was not sufficient time to make diligent inquiry as to the father, and that the overseers may not have known who he was. That however was not shewn in evidence, and the sessions considered that it was unnecessary. For any thing that appears on the statement of this case, the overseers may have known who the father was shortly after the child was born.

WILLIAMS, J.—I am of the same opinion. The words of the statute are plain. The case shortly amounts to this,—that *prima facie* the application was too late. That objection was taken, and the overseers did not shew why they had not applied earlier. If any reasons had been shewn why the application had not been made in October, that would have wholly varied the case. The January sessions were not the next, and no explanation was given why the first sessions were passed over.

Order of Sessions quashed.

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## The KING v. The Justices of OXFORDSHIRE.

Held, per *Coleridge, J.*, in the Outer Court, that under 4 & 5 W. 4, c. 76, s. 72, an application for an order on the putative father of a bastard child need not, in all cases, be made to the first sessions after the child becomes chargeable, but must be made to the first sessions at which it can be made with effect.

IN June, 1835, a fortnight before the Midsummer sessions, a young woman was delivered of a bastard child at Bletchington, in Oxfordshire. At the October sessions, the overseer of that parish went with the mother of the child to the sessions, to procure an order upon the putative father, but finding that it was necessary to be provided with corroborative evidence, he made no application then to the court, but returned to procure such evidence. At the Epiphany sessions, he applied by counsel for an order, but the justices decided that the application was made too late, and refused to entertain it.

*Churchill*, in Hilary term last, obtained a rule nisi for a mandamus to the justices, requiring them to hear the application; against which cause was shewn before *Coleridge, J.* in the Outer Court, by

*Chilton*. The justices were right in refusing to hear this application. The question turns upon the construction to be given to the 72d section of 4 & 5 W. 4, c. 76. The application was not made to the proper sessions. It may be conceded that the next sessions may mean the next practicable sessions, according to the determination of the Court upon the statute which gives the appeal against orders of removal. In *Rex v. The Justices of Worcestershire* (*a*) *Bayley, J.* says, with reference to the statute 17 Geo. 2, c. 38, "As the statute empowers the party to appeal to the next sessions, I think it virtually implies that he must appeal to those sessions, and no other." But here the application was not made even to the next practicable sessions, which

(a) 5 M. & S. 457.

were clearly the October sessions. The object of the legislature was to prevent persons from being improperly charged with the maintenance of illegitimate children of which they were not the fathers, and hence the object of this enactment is to compel the overseers to come promptly, so that the person who is charged may collect his evidence to meet the charge. As to the words "if they think proper,"—they only signify that the application itself shall be discretionary. The 73d section may be relied on, which provides "that six months' maintenance only shall be allowed;" and it will be inferred from that provision that the application need not be made to the next sessions. But that is a provision to meet the case of an application of which the *hearing* is deferred,—which might be in case there was not sufficient time to give the notices prescribed by the act, and under any other circumstances which might induce the Court to put off the hearing.

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*Lumley*, in support of the rule. This point was brought before the Court in the case of *Rex v. The Justices of Carnarvonshire (a)*, though the case was ultimately decided on another ground. The statute is only directory, and the overseers, although they *may* go to the next sessions, are not *bound* to do so. The language of the section is not imperative, for, first, the word "*may*" is used, and then the words "if they think proper," are introduced; which latter words can hardly be considered as not giving a discretion to the overseers to determine whether they will apply or not in the first instance. The statute does not contain any words of exclusion. The answer which has been given with respect to the provision in the 73d section, is not conclusive, because it seems hardly necessary for the legis-

(b) *Ante*, 272.

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lature to have made an enactment for what must be an unusual occurrence, and which the sessions themselves could at any time have provided for. It is conceded that the words "the next sessions," are not to be taken absolutely, but only as "the next *practicable* sessions." If the word "practicable" can be introduced, there is nothing to limit the application at all. Great inconvenience must arise from the strict interpretation which is contended for. Suppose the father cannot be met with, or the corroborative testimony cannot be obtained, or the mother will not disclose the name of the father, until after the sessions are over,—are the parish officers to be concluded, because they have not applied to the sessions next after the chargeability? In one of those cases they cannot make the application at all, because they do not know who is the father against whom to apply. And in other cases, if they must apply and have the hearing deferred, a great expense will be incurred without any utility. Again, the chargeability may cease just before the sessions, and revive after they are over. Would the parish officers be nevertheless concluded, because they did not apply to the next sessions after the first chargeability? But chargeability is a continued series of acts, and therefore each day that relief is administered, there is a new chargeability; in like manner as where there is a continuing nuisance or trespass, every continuance is a new nuisance or trespass, and therefore the statutes of limitation do not defeat the action, so long as there is a continuance. This distinguishes the case from the decisions with respect to appeals from orders of removal or poor rates, because in those cases there is one act done, and the delay alters the situation of parties, which is not the case here.

*Cur. adv. vult.*

On the first day of Trinity term,

COLERIDGE, J. delivered judgment.—This was an application for a mandamus to the justices of Oxfordshire, to hear an application for an order in bastardy. The child was born previously to the Summer sessions, 1835, and the overseers gave notice to the putative father that they should apply to the justices at the Michaelmas sessions for an order. At that time, not being prepared with corroborative testimony, they made no application; but they did make an application at the last Epiphany sessions, which was refused by the justices, as being too late. There was no doubt that the child was chargeable before the October sessions, and that the father was then known. There are two conditions precedent to the application for this order,—the birth of the child, and its chargeability; and the application must be made to the sessions next after the occurrence of these events. There is a third provision, namely, “after diligent inquiry as to the father,”—which is probably to be considered as merely directory. The question then is, what is the next sessions after the birth of the child and its becoming chargeable? It was contended that the child may be said to become chargeable upon every fresh act of relief, like the case of a trespass which is continued, in which there is every day a fresh trespass. But I am of opinion that this cannot have been the intention of the legislature; for if it were, the time would be prolonged indefinitely to the end of seven years.

I have considered this question with reference to the well-known provision as to appeals made against orders of removal, by which it is required that such appeals shall be made to the next sessions. That has been holden to signify that the appeal must be to the next *practicable* sessions. And I am clearly of opinion that the parish officers are not bound to apply to a sessions

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which could not proceed with effect to adjudicate upon the application; and therefore if the application be made to the next sessions after the child is born and after it has become chargeable, to which the overseers can apply with effect, it is sufficient. Each case must depend upon its own circumstances as to that. If the overseers have not been able, after using due diligence, to ascertain the putative father, or to discover any corroborative testimony, they would not be bound to apply to the next sessions; but, at a subsequent sessions, the justices would take these matters into consideration, and determine that those were the *next possible* sessions to which the application could be made.

The provision,—as to the limitation of maintenance to six months,—in the 73d section, has been referred to, to shew that the application need not be made to the very next sessions. But I think there is nothing in that argument; for that provision applies only to the *hearing*, and the *hearing* may be deferred for a long period, on many grounds; as, the absence of a witness, or many other cases which may be suggested. But the legislature, by using the word *next*, must clearly have intended some limitation as to the time of the *application*. Now, it is to be considered that the object of the legislature was to restrict the liability of the putative father, and to give him advantages which he did not before possess; but if it were to be held that the application need not be made at the next practicable sessions, but might be made subsequently, there could be no limitation but the seven years. That would be a great disadvantage to the putative father, which he did not labour under by the old law. The best rule for this Court to lay down, therefore, is, that the application must be made to the next sessions, leaving a discretion to the justices to determine in each case whether, under the circumstances,

it could have been made sooner with effect,—which, determination will still remain subject to the revision of this Court. Now, in this case, applying the above doctrine, it is clear that the child was chargeable before the October sessions; the father was known to the overseers, and they did not apply to those sessions, only because, through ignorance or inadvertence, they were unprepared with corroborative testimony: But they must be taken to have known the law, and what evidence would be required. The overseers not being prepared with the requisite evidence did not apply to the next practicable sessions, and the justices at the Epiphany sessions exercised their discretion properly, in refusing to entertain the application.

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This rule must be discharged, but, under the circumstances, without costs.



**REX v. The Justices of CORNWALL**, in the matter of an Appeal between the Parish of St. Glauvius and the Borough of Penryn (*a*).

**IN** Easter term last a rule nisi was obtained by Sir *W. Follett*, for a mandamus, commanding the justices of Cornwall to enter continuances to the next general quarter sessions for the said county, and hear the appeal of the churchwardens and overseers of the parish of St. Glauvius, against an order of two justices for the borough of Penryn, for the removal of *Charles Halvoso* and *Charlotte* his wife, and her three children by a

It is a sufficient statement of the ground of appeal against an order of removal, to say, that the party is settled in a particular parish, without specifying the species of settlement which the pauper has acquired.

(*a*) This case was argued and decided in Trinity term.

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former husband, from Penryn to St. Glauvius. The affidavits disclosed the following circumstances:—

The paupers resided in the borough of Penryn, and became chargeable there. The pauper, *Charles Halvoso*, and his wife, were examined before the magistrates of Penryn. The husband stated before them, that when he was about sixteen he bound himself apprentice to one *Bolitho*, and lived during the period of his apprenticeship in the parish of St. Glauvius; that he had duly served that apprenticeship, and had done no act to gain a settlement elsewhere; and that when he married his wife, in September last, she had three children by a former husband. The wife stated, that her former husband belonged to Penryn, and that by him she had three children under the age of thirteen years, who lived with her and her husband, and that they had done no act to gain a settlement in their own right.

The order of removal stated, that complaint had been made that *Charles Halvoso*, and *Charlotte* his wife, and *W., A., and E.*, son and daughters of the said *Charlotte*, by a former husband, neither of which said children had gained a settlement in his or her own right, had come to inhabit in Penryn, the said *Halvoso* and his wife not having gained a legal settlement there, or produced any certificate owning them to be settled elsewhere; and that the said *Halvoso* and his wife, and her children, were actually chargeable to Penryn;—and adjudged that the lawful settlement of them, the said *Halvoso* and his wife, was in St. Glauvius, and required the churchwardens &c., of Penryn, to convey “the said *Halvoso* and his wife, and her children, as part of the family of the said *Halvoso*, from Penryn to St. Glauvius.”

Notice of appeal was given by the parish of St. Glauvius. The following were stated as the grounds of appeal, “That the said *Halvoso* was not bound an ap-

prentice by indenture to *Bolitho*, and did not serve as such apprentice, as in the copy of his examination is stated, and that the said *Halvoso* is now settled in Penryn, and also that the said *W., A., and E.*, the son and daughters of the said *Charlotte*, by a former husband, *are, and each of them is, now settled in Penryn.*"

The appeal came on to be tried at the sessions for Cornwall, when the respondents gave in evidence the indentures of apprenticeship, and proved the service under it in St. Glauvius, but the sessions refused to hear the evidence tendered by the appellants, to shew that the children were settled in Penryn, because it was not stated in the notice of appeal "*how* the children named in the order of removal were settled in the borough of Penryn." The sessions confirmed the order. Against the rule nisi for a mandamus,

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*Archbold* now shewed cause. By the 57th section of the Poor Law Amendment Act, (5 & 6 Will. 4, c. 76,) when a man marries a widow who has children, those children become part of the family of the husband until they attain the age of sixteen. These children were therefore removable to St. Glauvius, [Lord Denman, C. J. The Court wish you to confine your argument to the question as to the sufficiency of the statement of the grounds of appeal.] The statement of the grounds of appeal is insufficient; and the sessions were therefore justified in refusing to hear the evidence on the part of the appellants. By the 81st section of the Poor Law Amendment Act, a statement of the ground of appeal is to be given by the appellant parish, and on the hearing of the appeal, no evidence of any other grounds of appeal than those set forth in the statement is to be gone into. The notice ought to have stated whether the children had gained a settlement in their

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own right, or in right of their father; and it ought to have been stated by what mode the settlement was gained, whether by hiring and service, or by apprenticeship, or by serving an office. [*Littledate J.* There are frequently very nice questions of law, whether a party has entered into a contract of hiring, or of apprenticeship.] One great object of the Poor Law Amendment Act was to prevent litigation; and to effectuate that object, the 79th section provides, that no poor person shall be removed until twenty-one days after notice in writing of his being chargeable, accompanied by a copy of his examination, shall have been sent to the overseers of the parish to which it is intended to remove him. This gives to the latter parish full information of the nature of the settlement upon which the *removing* parish relies, and will frequently save expense by preventing appeals. The object of the provision requiring the appellant parish to give a statement of the grounds of appeal is, that the respondent parish may have precise information as to the settlement intended to be set up by the *appellants*, and so be enabled to inquire into the truth of the statement, and abandon the order of removal, if the appeal be well founded. The statute which regulates the appeals against poor's rates requires the causes and grounds of appeal to be stated in the notice, and it has been held, that it is not sufficient to say that several persons have been omitted. The provisions in this act with respect to the statement of the grounds of appeal, will be entirely nugatory, if a notice so general in its terms as the present be held sufficient.

Sir *W. W. Follett*, in support of the rule. The notice of appeal was, under the circumstances, sufficiently precise. It must be considered in connection with the order and the examinations, for it has reference to, and

negatives, the statements which they contain. If so considered, it will be sufficiently obvious what was the nature of the settlement intended to be set up in Penryn. The examination of the wife states that her former husband was settled in the borough of Penryn, and that they have done no act to gain a settlement in their own right. The order adjudicates their settlement to be in Penryn, and the notice denies the settlement which the respondents set up.

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**LORD DENMAN, C. J.**—This rule must be made absolute. The justices have declined to hear important evidence. The appellants gave notice that they meant to dispute the order, in consequence of the children being settled in Penryn. It is contended by **SIR W. Follett**, that taking the examination and order with the notice, it is sufficient, and ~~that~~ it may be considered that the appellants merely took up the words of the respondents, and that therefore it was enough for them merely to state that the children were not settled in Penryn. But without putting our judgment on that ground, it seems to me that we had better state at once that there was sufficient information given by the notice itself in the present case. When the officers of a parish give notice that they mean to dispute the propriety of an order of removal, in consequence of the pauper being settled in a particular parish, that is sufficient, since it enables the other side to make inquiries.

**LITLEDALE, J.**—This notice of appeal is, in my opinion, sufficient. Before the present act it was sufficient to give the notice of appeal simply; now, the grounds of appeal must be stated. Formerly, when it was doubtful in which of three or four parishes a pauper was settled, the settlement in each parish might be gone

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into, by the appellants. Now, they must confine themselves to one parish.

PATTESON, J., and WILLIAMS, J., concurred.

Rule absolute (a).

(a) *N. R. Clarke*, in this term, moved for a rule nisi for a mandamus to the Justices of Derbyshire, to enter continuances and hear an appeal, in a case where the Sessions refused to hear evidence on a hiring and service set up by the appellants, on the ground that the notice of appeal did not state with whom the

service was; and he cited the above case from Arch. Quar. Sess. 278; but Lord Denman, C. J., said—"We are not disposed to think the decision was right as stated in that report, but you may take a rule." See *The King v. The Inhabitants of Kelvedon*, 1 Nev. & Perry, 138.

The Governor, Deputy Governor, Assistants, and Guardians of the Poor of the City of BRISTOL v. WAIT and others.

Where premises in the parish of A. are taken by the overseers of B., and used by them in the employment of the poor of B., such overseers are ratable to the relief of the poor of A.

The unprofitableness of an occupation of premises

does not exempt from ratability to the relief of the poor.

*Quere*, whether an objection to a poor-rate upon an occupier, on the ground that the character of the occupation exempts from ratability, is the subject of appeal only, or may be raised in an action of trespass or replevin.

REPLEVIN. Avowry by the defendants, as overseers of the poor of the parish of St. Philip and St. Jacob, in the county of Gloucester; first, that the taking and detaining &c. was done by them, by authority of the act of 43 Eliz., for the relief of the poor, and according to the tenor, purport, and effect of the same act; secondly, that the plaintiffs were occupiers of certain messuages and premises in the parish of St. Philip and St. Jacob, and by law ratable to the relief of the poor of that parish in respect of their said occupation; that a rate for the relief

of the poor of that parish was duly made, &c. and that the plaintiffs were therein rated in the sum of 35/., and had notice; that payment of the rate was demanded and refused; that the plaintiffs were summoned to appear before magistrates, and appeared; that the demand was proved, and no cause for non-payment shewn; and that the justices issued a warrant to distrain upon the plaintiffs' goods, and delivered it to the defendants to be executed,—under which warrant the defendants avowed the taking.

Replication to the first and second avowries, *de injuriâ*.

At the trial at the Gloucestershire summer assizes, 1834, before *Alderson, B.*, it appeared that the plaintiffs had taken certain premises out of the limits of the city, and situate in the parish of St. Philip and St. Jacob, for the purpose of putting out their poor, either simply to lodge them, or to employ them, at their discretion, and that in some parts of the premises the poor had been employed in the manufacture of lace, and that in other parts the poor had been merely lodged. It further appeared, that the proceeds of the manufacture came to the hands of the plaintiffs, but that the expenses were greater than the receipts. It was contended on the part of the plaintiffs, that their occupation of the premises did not render them ratable to the relief of the poor of St. Philip and St. Jacob; first, because the premises were occupied for a *public purpose*; and secondly, because the occupation was not *beneficial*. The defendants denied this proposition, and contended, further, that the plaintiffs being admitted to be *occupiers*, the question, whether the occupation was beneficial or not, could only be discussed on appeal to the sessions. The learned Baron thought that the plaintiffs were not ratable, and that the action lay, and he directed the jury to find for the plaintiffs; but gave the defendants leave to move to set the verdict aside,

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First point:  
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and to enter a verdict for themselves. Verdict for the plaintiffs. In Michaelmas term, 1834, *Ludlow*, Serjt., obtained a rule nisi according to the leave; and in Hilary term, 1836,

*Maule* and *W. J. Alexander* shewed cause. Though the objections taken to the rate might have been made the subject of an appeal to the quarter sessions, yet inasmuch as the objections amount to this, that the plaintiffs were not ratable at all, the defendants, by taking the distress, have, supposing the objection to be well founded, rendered themselves liable to be sued in trespass, and *a fortiori* in replevin. On this point, *Marshall v. Pannun* (a), *The Governor, &c. of the Poor of Bristol v. Wait* (b), *Lord Amherst v. Lord Sommers* (c), *Rex v. St. Luke's Hospital* (d), and *Holford v. Copeland* (e), were referred to.

The occupation must be shewn to be a beneficial occupation. Now, the occupation by the plaintiffs was not had with a view to individual benefit, and, moreover, it appeared that the manufactory was in fact a losing concern. It cannot therefore be said to have been a beneficial occupation, so as to create a ratability in the occupier.

Third point:  
 Whether oc-  
 cupation for a  
 public pur-  
 pose, so as to  
 exempt from  
 ratability.

Assuming the occupation to have been beneficial, there is this further objection, that it was *for a public purpose* merely, and not for the benefit or emolument of the plaintiffs in any personal or private respect; *Rex v. Terrott* (f), *Lord Amherst v. Lord Sommers*, *Rex v. St. Luke's Hospital*, *Holford v. Copeland*. In *Rex v. Terrott*, Lord Ellenborough, C. J., thus lays down the law with

(a) 9 Bingham 595; 2 Moore & Scott, 745.

(b) 3 Nev. & Mann. 359; 1 Adol. & Ell. 264.

(c) 2 T. B. 372.

(d) 2 Burr. 1053.

(e) 3 Bos. & Pull. 129.

(f) 3 East, 506.

respect to such an occupation: "The principle to be collected from all the cases on the subject is, that if the party rated have the use of the building, or other subject of the rate, as a mere servant of the crown, or of any public body, or in any other respect for the mere exercise of public duty therein, and have no beneficial occupation of or emolument resulting from it in any personal or private respect, then he is not ratable." That an occupation such as that in question here does not render the occupiers ratable, is, it is apprehended, one of the best settled points on the poor laws. The premises in question stand in precisely the same situation as a workhouse, and the fact of their being situated in a foreign parish raises no material distinction.

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*Ludlow*, Serjt., Sir *W. W. Follett*, *Maclean*, and *Greaves*, contra. When there is an occupation *de facto*, the occupier is *primâ facie* ratable, as in the case of inhabitancy, which in *Marshall v. Pitman* (a) was held to create a *primâ facie* liability to be rated: and in such case the magistrates have *jurisdiction*, and an objection that the occupation is not beneficial, or that the *character* of the occupation exempts from ratability, is the subject of appeal only. No case can be produced in which an action of trespass or replevin for a distress for a rate upon a person, who was in fact an occupier, has been supported. In the cases cited there was no occupation by the party rated, and therefore no jurisdiction in the magistrates. In the course of the argument upon this point, *Marshall v. Pitman*, *Weaver v. Price* (b), *Durant v. Boys* (c), *Hutchins v. Chambers* (d), *Milward v.*

(a) 2 Moore & Scott, 745; 9 Bingham, 595.

(b) 3 Barnw. & Adol. 400.

(c) 6 T. R. 580.

(d) 1 Burr. 580.

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*Caffin* (a), *Groenvelt v. Burwell* (b), *Nicholls v. Walker* (c), *Fawcett v. Foulis* (d), *Bonnell v. Beighton* (e), *Rex v. Hull Dock Company* (f), *Rex v. Newbury* (g), *Lord Amherst v. Lord Sommers*, *Holford v. Copeland*, and *Rex v. Trecothick* (h), were cited and commented upon by the counsel; and *Rex v. Justices of Bucks* (i), was referred to by *Coleridge, J.*, who remarked, that if the argument upon this point were correct, there would be no ground for refusing a mandamus to magistrates to enforce the payment of rates, except where the fact of occupation was in dispute.

Second point. The occupation contemplated by the act of 43 *Eli.* need not be *profitable*;—it is sufficient that the subject-matter of the occupation be in its nature *capable* of yielding a profit. [Lord *Denman, C. J.* We are quite clearly of opinion that the question, whether the occupier actually made a profit, cannot be raised.]

Third point. The character of the occupation is not of such a nature as to exempt from ratability. A workhouse situate within its own parish cannot be rated, because parish property cannot be rated for the benefit of the parish. Property of the crown cannot be rated (except in the hands of an occupier who derives individual benefit from it,) because the crown is not named in the statute of *Eli.*; and property in the occupation of the public cannot be rated,—not by reason of any exemption, but because there is no individual on whom the rate can be charged. The occupation in the present instance does not fall within the principle of any of these cases. It would be a great hardship on the parish of St. Philip and St. Jacob

(a) 2 W. Bla. 1330.

(b) 1 Id. Raym. 454.

(c) *Cru. Car.* 394.

(d) 1 Mann. & Ryl. 102; 7  
*Barnw. & Cressw.* 394.

(e) 5 T. R. 182.

(f) 1 Nolan.

(g) 4 T. R. 475.

(h) 2 Adol. & Ell. 405.

(i) *Ante*, ii. p. 37.

if the plaintiffs were not liable to be rated; for the premises might have been rated in other hands had they not been taken by the plaintiffs. The argument of the plaintiffs would go to this extent: that where the whole of a parish belonged to one person, he might take land or premises situate in an adjoining parish for the employment of his own poor, and, in effect, tax the adjoining parish, to the extent of their loss of poor-rate upon those lands or premises, towards the support of those poor.

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In this term judgment was delivered by

Lord DENMAN, C. J. as follows:—This was an action of replevin tried before Mr. Baron *Alderson* at the summer assizes for the county of Gloucester, 1834, when a verdict was found for the plaintiffs, damages 4*l.* 4*s.*, with liberty for the defendants to enter a verdict for them, no fact (as is added in the report) having been in dispute.

The motion was made accordingly, and several points of inferior importance were raised before us upon the discussion; but the most material question was, whether the goods, the subject of the action, had been properly taken under a warrant of distress for a poor-rate; or, in other words, whether the plaintiffs were the occupiers of ratable property in the parish of St. Philip and St. Jacob, in the county of Gloucester, of which the defendants were overseers. It appeared upon the evidence, that the plaintiffs (being governors of the poor of the city of Bristol) had taken certain property out of the limits of the city and within the parish of St. Philip and St. Jacob, for the purpose of putting out their poor, either simply to lodge them, or to employ them, at their discretion. It further appeared, that in some part of the property (houses and buildings) the poor had been employed in a manufacture which was stated to have been a losing concern, and in other parts they had been merely lodged. It further ap-

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peared, that such property would have been ratable towards the relief of the poor of St. Philip and St. Jacob, unless the kind of occupation in this particular case exempted it. It therefore became a question, whether the managers of the poor (whether governors, as in this instance, or overseers ordinarily) renting ratable property out of the limits of their district, city, parish, township or place, are exempt from ratability, because such property is applied solely to the purpose of disposing of their own poor, with which, upon the statement already made, the place in which the property is situated has no concern.

Upon this question we were referred to and pressed by the cases well known, and so often referred to, of property held merely for public purposes, as stables taken by the colonel of a regiment for the use of that regiment—*Lord Amherst v. Lord Sommers* (a); of property devoted to charitable purposes, as apartments held by the matron of the Philanthropic Society, merely to superintend the children,—*Rex v. Field* (b); or the like in the case of the superintendant of St. Luke's,—*Rex v. St. Luke's Hospital* (c); in each of which instances there was no occupation beyond the public purpose in the former, and the charitable in the latter; with respect to which cases it is enough to say, that we agree fully and without hesitation to the principle and authority of them all; observing at the same time, that as soon as any independent occupation for private advantage is discoverable, ratability immediately attaches. The case of the commanding officer of barracks, *Rex v. Terrott* (d), furnishes a full illustration and confirmation of the latter remark.

(a) 2 T. R. 372.

(b) 5 T. R. 587.

(c) 2 Burr. 1053.

(d) 3 East, 506.

The absence of "beneficial occupation" was also much insisted upon, and it was contended that *that* is the true criterion to ascertain whether property be ratable or not. It is not to be denied that this phrase "beneficial occupation" has been in frequent use, and, generally speaking, it serves tolerably well to convey rather a popular notion than to give a certain rule for deciding the question of ratability in every instance; because, if by "beneficial" be meant *profitable*, or any thing like it, the expression is obviously fallacious. And upon this point all discussion is superfluous, because the case of an unprofitable and losing occupation (expressly so found) of a coal mine, has been held not a case of exemption from ratability,—a coal mine, by the words of the statute of *Elizabeth*, being subject to a rate. Without affecting the precision of an exact definition, it would probably be nearer the truth to say, that the *presumptive* liability arising from occupation is to be explained away in each case. Why is the coachman living in apartments by permission of his master not ratable, according to Lord *Kenyon* in the case of *Rex v. Field*? It is his master's occupation. Why were not the matron and the superintendent, in the cases above referred to, ratable for the apartments they occupied? Because, as they had no more than was necessary to carry into effect the object of the establishment in each instance, to rate them would in reality be to rate the charity children in the one case and the lunatics in the other. It cannot be said that *no benefit* is derived. By the occupation of the portion of the building in each of the cases alluded to, the expense of a house or lodging elsewhere is saved.

But, moreover, the question here does not arise upon a rate imposed by the managers of the poor of Bristol, upon premises occupied by their own poor within their own city. On the contrary, the rate in question was im-

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posed by foreign overseers upon property situated in their own parish, and which, in the hands of an ordinary individual, would clearly be ratable to the relief of their poor. How does it concern the overseers and rate-payers of the parish of St. Philip and St. Jacob, in what manner any person or persons manage the property taken and held in that parish? Suppose the governors of the poor of Bristol to have taken 100 acres of land, and to have brought such of their paupers as were capable of labour from a poor-house in Bristol, to employ them upon the land, as a beneficial mode, according to their opinion, of disposing of the poor;—suppose also that the return, whatever it might be, was applied solely towards the maintenance of the poor who had laboured upon the farm, or of those who were unfit for labour and had been left behind,—how can this constitute a better claim to exemption from ratability in the parish where the property lies than a *losing* occupation, which it is quite certain does not affect the question of liability? The same rule must of course apply to every species of property. We are, therefore, upon the whole, of opinion that the buildings so held by the plaintiffs in the parish of St. Philip and St. Jacob, were ratable to the relief of the poor of that parish, and that a verdict, according to the leave reserved, should be entered for the defendants.

Rule absolute.

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## ADDISON and others v. ROUND.

**TROVER** by the plaintiffs, as churchwardens and overseers of the parish of Wednesbury, to recover certain books and accounts which had been in the custody of the defendant as waywarden of that parish. Pleas: first, not guilty; secondly, that the plaintiffs were not possessed as of their own property; third, the statute of limitations. At the trial before *Alderson, B.*, at the last spring assizes for Staffordshire, the plaintiffs were nonsuited upon the following facts:—The defendant had been the waywarden of this parish from Michaelmas, 1827, to October 6, 1832, and during such time kept books of accounts, assessments, and other documents relating to the highways. Some time after he had ceased to hold the appointment, his accounts were settled and the balance due to him paid. In 1835 a vestry meeting was called for the purpose of directing with whom the books, &c. should be deposited, and a resolution was regularly passed, that they should be entrusted to the plaintiffs, the then churchwardens and overseers. The books and accounts, &c., were then demanded of the defendant, but he refusing to deliver them up, a mandamus was issued, requiring him to deliver up to the then churchwardens all books of accounts, &c. in his custody, power, or possession, relating to the said highways, during the period of his serving the office, to be kept for the use of the parish. To this the defendant made a return, denying that he had them in his custody, power, or possession, on the day of issuing the writ of mandamus, or at any time since, nor when he had been required by the churchwardens to deliver them up. This

An officer in whom a right to the custody of chattels is vested by act of parliament, has not, in respect of such right merely, such a property in them as will enable him to maintain an action for the wrongful detention of them.

Parish officers, or other persons, by whom parish books &c. are appointed by the inhabitants in vestry assembled to be kept, cannot bring trover against an ex-waywarden for the books of accounts, assessments, &c. kept by him during the period in which he was in office, and with the possession of which he has never parted.

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return being held by the Court to be sufficient (a), the rule for a mandamus was discharged. No peremptory mandamus of course issued, nor was any action brought for a false return (b). A personal demand was subsequently made to the defendant on behalf of the plaintiffs, and delivery refused. The learned judge nonsuited the plaintiffs, on the ground that the action was not maintainable by the churchwardens and overseers, they not being incorporated with respect to chattels (c), nor having any *property* in the books, &c.


*Ludlow*, Serjt., now moved to set aside the nonsuit and enter a verdict for the plaintiffs. It is submitted that the plaintiffs had, beyond all question, a special property in the required documents; and that if so, and they were deprived of it, they may maintain trover. A special property in these books, &c., is vested in the plaintiffs by operation of 13 *Geo. 3*, c. 78, s. 48, and 58 *Geo. 3*, c. 69, s. 6. The former of those enactments directs the waywarden, after his accounts are settled, to transmit his books, &c., to the churchwarden or overseer, (by which must be intended churchwardens and overseers, except where there is only one such officer,) to be kept for the use of the parish. The plaintiffs are therefore entitled to the custody of these documents, and if so entitled, they have such a special property in

(a) *Vide ante*, 307.

(b) The present plaintiffs not being the prosecutors of that mandamus, which issued upon the application of the churchwardens only, could not, it would appear, have included a count for a false return in the present action, as parties aggrieved by such return.

(c) The 17th section of the stat. 59 *Geo. 3*, c. 12, which empowers churchwardens and overseers to hold and sue for parish property, as a body corporate, extends only to "buildings, lands, and hereditaments." And see *M. 11 H. 4*, fo. 12, pl. 25; *Com. Dig. tit. Eglise* (F 3).

them as will enable them to maintain trover. If they had once had possession of them, it is apprehended that there would have been no doubt on the subject. So the learned judge at the trial thought; and he also considered that the present churchwardens and overseers would stand in the same situation as those who were in office in 1832, at the time when the defendant went out of office. By 58 Geo. 3, c. 69, s. 6, all rates and assessments, accounts and vouchers of waywardens are (inter alia) to be kept by such person and persons, and deposited in such place and manner as the inhabitants in vestry assembled shall direct. [Coleridge, J. Are you right in saying that the books are parish property?] The waywarden is to provide books. The defendant's accounts have been settled and the balance has been paid over to him. [Lord Denman, C. J. In those accounts have the books been paid for?] Most probably they have, but that does not appear. [Lord Denman, C. J. The case seems to depend upon that.] Here a special property is vested in the plaintiffs by act of parliament. [Patteson, J. I want to see the act which vests the property in the churchwardens.] There is none which does so in direct terms, but the books are to be transmitted to the churchwardens and overseers, to be kept for ever by the churchwardens, or such other person or persons as the inhabitants in vestry assembled shall appoint, for the use of the parish. The *cetteux que trust* are the rated inhabitants, but the legal possession must be intended to be in the parish officers. It was foreseen that this would be a case of difficulty, but the defendant was a wrong-doer; and as the right of plaintiffs to sue, though not perhaps clear, cannot be said to be not far from being so, it is hoped that the Court will give them an opportunity of having it more fully considered.

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LORD DENMAN, C.J.—I am of opinion that the non-suit was right. The plaintiffs, by shewing themselves entitled to the *custody* of these documents, do not prove that they are owners so as to be able to maintain trover. By the 13 *Geo. 3*, c. 78, the waywardens are directed to keep books of accounts, and to transmit all such books and all assessments to the churchwarden or overseer of the parish, to be kept for the use of the parish; and in case the waywarden neglects (amongst other things) to deliver such books, assessments, &c., in manner aforesaid, he is to forfeit for every such offence, any sum not exceeding 5*l.* nor less than 40*s.* No power is given to compel the delivering up of the books by action, though a penalty is imposed in case of neglect to do so.

LITLEDALE, J.—I also am of opinion that the non-suit was right. The 48th section of 13 *Geo. 3*, c. 78, directs the surveyor (waywarden) to “keep one or more book or books, in which he shall fairly enter a just, true, and fair account of all such money as shall have come to his hands.” It does not say that he is to do so at the expense of the parish, but simply that he is to do it. It then goes on to direct, that after the waywarden’s accounts have been settled and allowed, or disallowed, he shall transmit his books, &c., to the churchwarden or overseer, and imposes a penalty in default of his so handing them over. Under that enactment I do not think even a special property is transferred to the parish officers until the books have been delivered over. The 6th section of 58 *Geo. 3*, c. 69, then enacts, that the parish books, &c., therein mentioned, including the waywarden’s accounts, shall be kept by such person and persons, and deposited in such place and manner as the inhabitants in vestry assembled shall direct; and that if any person in whose hands or custody any such books

shall be, shall, after reasonable notice and demand, refuse or neglect to deliver the same to such person or persons, or to deposit the same in such place as shall, by the order of any such vestry, be directed, such offending person shall pay a forfeit not exceeding 50*l.*, nor less than 40*s.* That enactment imposes a distinct penalty upon a party refusing to comply with the provisions of that act. It then continues, " Provided nevertheless, that every person who shall unlawfully retain in his custody, or shall refuse to deliver to any person or persons authorized to receive the same, or who shall obliterate, destroy, or injure, or suffer to be obliterated, destroyed, or injured, any book, rate, assessment, account, voucher, certificate, order, document, writing, or paper belonging to any parish, or to the churchwardens and overseers of the poor, or surveyors of the highways thereof, may in every such case be proceeded against in any of His Majesty's courts, civilly or criminally, in like manner as if this act had not been made." The earlier part of the clause is merely to impose a penalty upon a party refusing to comply with its provisions; and the only way you can proceed under it is by enforcing the payment of such penalty. It does not vest in the persons appointed by the vestry, any special property in the books. It was the duty of the defendant to deliver over the documents in question to the plaintiffs, and in failing to do so he has been guilty of a breach of duty; but until the books, &c., were actually delivered over, the plaintiffs had no *property* in them (*a*).

PATTESON, J.—As far as I can see, the legislature has not thought fit to vest the property of these books in any body. It only directs the waywarden to keep a book or books of accounts. I do not see how the

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(*a*) Acc. per *Hulse, J.*, M. 11 H. 4, fo. 12 a, pl. 25.

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churchwardens in 1832 had any right to sue, much less their successors. No such action has ever yet been brought. It has been a matter of common occurrence to issue a mandamus requiring parties to deliver over such documents, upon the supposition that no action would lie for that purpose (a). I am not aware of any principle of law by which a person merely entitled to the custody of a thing is enabled to bring an action for the purpose of *obtaining* that custody.

COLERIDGE, J.—When there has been no actual possession of a thing, there must be either a general or special property to support an action of trover. Now what property is there here? My brother *Ludlow* says, that the officers in 1832 could have sued, and that if so, these may also. I can find no authority for that position. The Court has been in the habit of granting a mandamus to compel the delivery of parish papers, which would have been wrong if an action had been maintainable.

Rule refused.

(a) That a mandamus does not lie where the party grieved has a remedy by action, see *Res v. Bank of England*, 2 Dougl. 526; *Res v. Archbishop of Can-*

*terbury*, 8 East, 219; *Res v. St. Katherine Dock Company*, 1 Nev. & Mann. 101; and 4 Barn. & Adol. 360.



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## REX v. The Justices of STAFFORDSHIRE.

*WIGHTMAN* had obtained a rule nisi for a mandamus to the justices of Staffordshire, commanding them to enter continuances, and to hear the appeal of *J. S.* against an order made by two justices under 53 *Geo. 3*, c. 127, for the payment by him of the sum of 3*s.* 11½*d.*, in which he had been assessed to the rate made for the repair of the parish church of Wolverhampton, together with costs. *J. S.* had been assessed at 3*s.* 11½*d.* in the church rate of the parish of Wolverhampton, and had refused to pay the amount. Upon the complaint of the churchwardens he was summoned to appear before two justices, and appeared accordingly, and objected to the legality of the rate. After examination in due form, the justices made an order, whereby they directed him to pay the said sum of 3*s.* 11½*d.* to the churchwardens of the parish, together with —*s.* for costs. At the Easter Sessions 1835, an appeal was entered and respited, and on 20th June the appellant served upon the existing churchwardens, and upon *one* of the two magistrates by whom the order was made, a notice of his intention to try the appeal at the then next sessions, which were to be held on 30th June. When the appeal came on to be heard, the appellant was called upon to prove his notices, and in default of proof of service of the notice upon *both* the magistrates, the sessions dismissed the appeal. The rule of sessions provided that seven days notice of intention to try any appeal should be given previously to the commencement of the sessions at which it was intended to try such appeal; but it was silent as to the persons *to whom* the notice was in any case to be given. It was, however, sworn to be the practice of the sessions, in all cases of appeals against orders and convic-

Where notice of an appeal against an order of two justices is required to be given to such justices, service of notice upon one only is sufficient.

*Semble*, That the Court of Quarter Sessions has no right to require that notice of intention to try an appeal against an order for the payment of church rates, made by two justices under 53 *Geo. 3*, c. 127, shall be given to such justices.

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tions of justices made out of the sessions, except orders of removal, to require that notice of the intention to try the appeal should be given to such justices.

*Whateley* now shewed cause against the rule. The question is, whether the rule of the sessions, requiring notice to be given to the justices, is a reasonable rule; and it is submitted that it is so. In many cases it is very important to the public interests that justices should have notice of appeals against their own judgments, so as to be prepared to defend them; and they are respondents by name. If one is entitled to notice, both must be equally so. [*Littledale, J.* Suppose instead of two there were six, would it be necessary to give notice to all?] The argument goes to that length; but in practice, the inconvenience which might ensue in such a case does not arise, as orders and convictions made out of sessions, are always made by two justices only.

*Wightman* contra. It is unnecessary to give notice to the justices at all. The real parties are the churchwardens. At all events, the notice to one magistrate is sufficient.

LORD DENMAN, C. J.—The magistrates must clearly enter continuances, and hear the appeal. The act of parliament under which the order is made, and by which the appeal is given (53 *Geo. 3*, c. 127,) does not speak of any notice. It is not competent to the justices to introduce a new condition, and if it were necessary that the magistrates should have notice, I apprehend that service of the notice upon one of them must be considered as a service upon both.

LITLEDAL, J.—I am of the same opinion. The service on one justice was sufficient.

PATTESON, J.—In this act of parliament there is nothing about any notice. It is entirely silent upon the matter. The sessions cannot engraft the requirement of notice upon the act of parliament.

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COLERIDGE, J.—The rule of practice is silent as to whom the notice is to be given, and yet the sessions profess to have decided on the rule of practice. However, it is sufficient to say, that a notice upon one of two justices who acted together, must be considered as notice to both.

Rule absolute.

COLEBROOK v. TICKELL and WALKER.

**TRESPASS** for taking the plaintiff's goods and chattels as a distress, and detaining same until the plaintiff was compelled to pay 38*l.* 15*s.* to regain possession of the said goods and chattels, and also for again taking his goods, &c. as a distress, and thereby compelling the plaintiff to pay 5*l.* 13*s.* to regain them. Plea (as well under 21 *Jac.* 1, c. 12, as under the local acts hereinafter mentioned), not guilty; whereupon issue is joined. And thereupon, in pursuance of an order made by consent, under the authority of 3 & 4 *Will.* 4, c. 42, s. 25, the

An incorporeal hereditament cannot be made ratable to the relief of the poor, by virtue of a local act of parliament, except by clear and express words.

By a local act, the rector, churchwardens, overseers, and vestrymen, of a parish, are authorized to make three distinct rates upon all persons who shall inhabit, hold, occupy, possess, or *enjoy* any land, house, shop, warehouse, or other building, tenement, or *hereditament*, that is to say, one rate for the relief of the poor, another for the repair of the church, and another for cleansing and lighting the streets, and repairing the highways of the parish,—such last-mentioned rate to be a pound rate upon the annual rent or value of all messuages, lands, tenements, and hereditaments, as should be held or occupied within the parish: Held, that the word “hereditament,” as used in the former as well as the latter part of the enactment, means such hereditaments only as are the subject of actual corporeal *occupation*, and that therefore no incorporeal hereditament is thereby made ratable.

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facts were stated, for the opinion of the Court, in the following case :—

By an act (11 Geo. 3, c. xv.) passed “ for the better paving that part of the High Street, in the parish of St. Mary Matfelon, otherwise Whitechapel, which lies in Middlesex, and for removing obstructions and annoyances therein,” commissioners were appointed, for the purposes therein mentioned; and after reciting that there was due, and had been accustomed to be received for every cart or waggon loaded with hay, brought into the said parish, and sold on the usual market days, the sum of 6*d.*, 2*d.* whereof was due and of right belonging to the lord of the manor of Stebonheath, otherwise Stepney, in the county of Middlesex, as owner or proprietor of the said market, and had accordingly from time to time been paid to and received by him; and 2*d.* to the said parish, for cleansing and taking away the dirt and filth occasioned by such carts and waggons, and 2*d.* to the several householders and inhabitants, against whose doors the hay so exposed to sale stood,—to the end, therefore, that the useful purposes of that act might be the better and more speedily carried into execution, and for and towards increasing the fund for defraying the charges of the same; it was enacted, that thenceforth there should be paid to a receiver, to be appointed by the commissioners, for every cart or waggon loaded with hay, brought into the said parish for sale, on the usual market days, and sold or exposed to sale, the sum of 6*d.*, in lieu of all other tolls which are or should be authorized to be taken and collected, the said receiver paying thereout to the lord of the said manor, or other owner of the said market for the time being, or such other person or persons as should be appointed by him or them to receive the same, the sum of 2*d.*, clear of all charges and expenses, for every cart or waggon loaded, &c. (as above.)

By 46 Geo. 3, c. lxxxix. "for the better relief, maintenance, and employment of the poor within the parish of St. Mary, Whitechapel, in the county of Middlesex, cleansing and lighting the squares, streets, &c., and other parochial purposes," certain trustees were appointed; and it was by the 52d section of that act enacted, that the said trustees should annually meet together, at a certain period, and should then settle and ascertain the sum and sums of money respectively necessary to be raised in the ensuing year, for the relief, &c. of the poor, and for other the purposes therein mentioned.

By sect. 53 it was enacted, that the rector, churchwardens, overseers, and vestrymen, qualified as in the said act mentioned, should assemble in the vestry room, within fourteen days next after the said several sums of money should have been ascertained, and the said rector, &c.; or any nine or more of them so assembled, were thereby required to make and sign three distinct rates or assessments, not exceeding the amount of the respective sums so settled and ascertained, upon all persons who should *inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, or other building, tenement, or hereditament*, (that is to say,) one rate or assessment for the relief, &c. of the poor, another for the repair of the parish church, and another for cleansing and lighting the squares, streets, &c., and regulating a nightly watch, and repairing the highways within such parts of the parish as are not within the liberties of the Tower of London and city of London, such last-mentioned rate to be a pound rate upon or according to the annual rent or value of all messuages, lands, tenements, and *hereditaments* as should be *held or occupied* within such parts of the said parish as were not within the said liberties, provided that the same did not exceed in any one year

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1s. 3d. in the pound, upon such messuages, lands, tenements, and hereditaments.

Sect. 56 provides for the allowance of such rate by four justices.

Sect. 63 enables the collector, in case of neglect or refusal to pay the rates within fourteen days, by the warrant of two justices, to levy the same upon the goods of the party refusing or neglecting.

Sect. 60 gave the same methods of enforcing the payment of the rates made for the relief of the poor, as were or should be given by the 43 *Eliz.* c. 2, or by any subsequent act relating to the relief of the poor.

Sect. 69, after reciting that divers houses, tenements, and *hereditaments*, within the parish, were let at small rents, or to weekly or monthly tenants, or entirely *let out in lodgings or separate apartments*, or let ready furnished, and the collection of the rate charged, by virtue of the said act, upon such houses, tenements, and hereditaments, was attended with much difficulty, and had frequently been evaded, made the landlord liable for the rates in certain cases.

Sect. 70 speaks of persons *renting* and *occupying* any house, tenement, or *hereditament*.

Sect. 71 speaks of persons *removing out of* or from, or quitting the possession of any house, building, land, tenement, or *hereditament*, and of persons entering into the *occupation* of any house, building, land, tenement, or *hereditament*, out of or from which any such persons should have so *removed*, before the rates or assessments charged thereon by virtue of that act should have been paid and discharged, and provides for the payment thereof in such cases.

Sect. 74 enacted, that the goods and chattels of any person assessed, and neglecting or refusing to pay, might


be distrained upon in manner aforesaid, not only in the said parish, but in any other place within the said county of Middlesex.


The plaintiff is lord of the said manor, and owner of the said market, and is, as such lord of the manor and owner of the market, entitled to the sum of 2*d.*, clear of all charges and expenses, for every cart or waggon loaded with hay, brought into the said parish, and sold or exposed for sale on the usual market days, as in the same act mentioned, and was so entitled before and during the time for which the several rates or assessments hereinafter mentioned were made, and the said sums therein mentioned were rated, assessed, and levied; and the plaintiff hath regularly received the same sums, which have yielded to him an annual profit exceeding the sum at and for which he hath been and was rated, as hereinafter mentioned, that is to say, an annual profit of 200*l.* and upwards, but in respect whereof he hath annually only been rated at the sums of 38*l.* 15*s.* and 5*l.* 13*s.*

The said sum of 6*d.*, of which the said sum of 2*d.*, payable to the plaintiff as owner and proprietor of the said market as aforesaid, is payable and received in lieu of all other tolls as aforesaid, for every cart and waggon brought into any part of the said parish for sale, and sold or exposed to sale on the usual market days as aforesaid.

There is no ground for rating the plaintiff, unless the Court shall be of opinion that he was ratable in respect of the market, or the money payment in lieu of toll.

Rates were duly made and allowed at Lady-day, 1833, by one of which rates the plaintiff, as lord of the manor and owner of the market, was rated at the sum of 38*l.* 15*s.* for the relief of the poor, and by another of which he was rated in the sum of 5*l.* 13*s.* for cleansing and lighting the squares, streets, &c., in respect of the said sum of 2*d.* for every cart or waggon loaded with

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hay, brought into the said parish, and sold or exposed to sale on the market days as aforesaid; and the plaintiff, refusing to pay such sums of 38*l.* 15*s.* and 5*l.* 13*s.* respectively, proceedings were duly taken, and the defendants, as justices of, &c. signed a warrant of distress, under which the plaintiff's goods were taken and detained, until payment of such two sums.

Due notices of this action were given to the clerk to the trustees, under the act of 46 *Geo.* 3, and also to the defendants, and this action was commenced within six calendar months after the facts were committed.

Copies of the local acts accompany this case. The plaintiff or the defendants may refer to any part or parts of them.

The questions for the opinion of the Court are—

First, Whether the plaintiff was liable to be rated in the said sums of 38*l.* 15*s.* and 5*l.* 13*s.*, or either of them, in respect of the sum of 2*d.* so payable to him as aforesaid. If the plaintiff was so liable, then judgment is to be entered for the defendants on the first and second counts, or either of them, otherwise for the plaintiff.

Sir *W. W. Follett*, for the plaintiff. The act of 46 *Geo.* 3, does not impose upon the plaintiff any liability to be rated in respect of the sum of 2*d.* receivable by him from the commissioners appointed by the act of 11 *Geo.* 3, in lieu of the old toll which he had been accustomed to receive as lord of the manor and owner of the market. He is not an inhabitant of the parish, or an occupier, nor has he any property or interest in the parish, except in so far as that he is entitled to the sums of 2*d.* in lieu of toll. Under the statute of 43 *Eliz.* c. 2, it is quite clear, that he would not be liable to be rated in respect of these tolls; *Rex v. Bell* (a). [*Campbell*, A. G.

(a) 5 Maule & Selw. 221.

contra, admitted, that the plaintiff would not be ratable under 43 *Eliz.*] Neither is he ratable under this local act.

First, Supposing any ratability in respect of these sums of 2*d.* to exist, the parties liable would be the commissioners, who receive the toll, and not the plaintiff, who receives a sum of 2*d.* from the commissioners, but does not enjoy any toll.

Secondly, Regarding the right of the plaintiff as an incorporeal hereditament, still he is not ratable. It is admitted that he would not have been ratable before the act passed, and it is now submitted that by this act no fresh subject of ratability is intended to be introduced. Strong and clear language is requisite, especially in a local act, to impose a liability to be rated upon persons who were not ratable before. The rates are, by sect. 53 of this act, to be made "upon all and every the person and persons who do and shall inhabit, hold, occupy, possess, or enjoy, any land, house, shop, warehouse, or other building, tenement, or hereditament." The word "*tenement*" is a very large word, comprehending all that may be *holden*. The word "*hereditament*" is, perhaps, a still larger word (*a*), comprehending all that may be *inherited*, and therefore in its largest sense comprehending *tolls*. But these words must be construed as meaning only such tenements or hereditaments as are *ejusdem generis* (*b*) with those previously specified. *Rex v. Man-*

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(*a*) *Vide* 5 *Man. & R.* 460 (*b*).

(*b*) By 11 *Geo.* 2, c. 19, s. 14, "To obviate some difficulties that many times occur in the recovery of rents, where the demises are not by deed," it is enacted, "that it shall be lawful for the landlord, where the demise is not by deed, to recover

a reasonable satisfaction for the lands, tenements, or hereditaments, held or occupied by the defendant, in an action on the case for the use and occupation of what was so held or enjoyed." This section of 11 *Geo.* 2, c. 19, might therefore perhaps have been referred to as furnishing an

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*chester Waterworks Company (a), Rex v. Mosley (b).* Construing these words accordingly, it will be found that no tenement or hereditament is included, but such as is of a corporeal nature, and capable of having a local situation within the parish. In every other part of this act, it will be seen that the words are used as referable only to corporeal tenements or hereditaments. Sects. 69, 70, and 71, may especially be referred as shewing, beyond doubt, that in those sections at least the legislature contemplated the words as referring to things of a corporeal nature only. In *Rex v. The Manchester Waterworks Company* it was held, that the word "tenement," (and "hereditament" would be within the same rule,) occurring in a local act of parliament, is not necessarily to have its wide legal sense given to it, but that its meaning is to be collected from the whole purview of the act. Here the lord of the manor was not previously liable to be rated to any of the rates of the parish; and as, therefore, it would have been unjust to impose upon him a new liability, without any equivalent, the Court will not so construe the act unless the words clearly require it.

Sir *J. Campbell*, A. G., contra. The question is, what is the meaning of the word "hereditament" occurring in

example of the employment by the legislature of the large and comprehensive terms, "tenements and hereditaments," in a case where from the preamble it would appear that a particular class of tenements and hereditaments were in contemplation, namely, those which lying in livery are ejusdem generis quoad the reservation of rent, as *lands*, which, as Lord Coke says, (Co. Litt. 148 a.) are "inheritancess

*manurable*, whereinto the lord may enter and make a distress," and not to apply to tenements or hereditaments incorporeal, out of which no rent can be reserved.

This rule of construction was not presented to the Court in *Jones v. Reynolds*, 6 N. & M. 441.

(a) 3 D. & R. 20; 1 B. & C. 630; S. C. 1 D. & R. Mag. Ca. 479.

(b) 3 D. & R. 385; 2 B. & C. 226; S. C. 2 D. & R. Mag. Ca. 91.

the 53d section of this act. It is admitted that *primâ facie* an incorporeal hereditament would be included, and the authorities cited to shew that it ought to be limited to hereditaments of a corporeal and local nature are not applicable. Incorporeal hereditaments are not ratable under 43 *Eliz.* because rates are by that act imposed only upon *occupiers*, and such hereditaments cannot of course be the subject of occupation. And in *The King v. Manchester Waterworks Company*, and *The King v. Mosley*, there was the same reason for so limiting the word "hereditament." But here the words are "any person who shall inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, or other building, tenement, or hereditament." *Reddendo singula singulis*, it follows that the rate may be imposed upon any person who enjoys a hereditament. No such words as those of this section occur in any case in which the Courts have held that the word "hereditament" should be restricted. Then it is said, that the legislature cannot be taken to have intended such an injustice as that of imposing a ratability on a person not before ratable, without an equivalent compensation. The legislature have, by this enactment, only remedied a defect which has been often lamented. It was intended that persons should be ratable according to their *ability* or their *interest* in the parish; and, therefore, persons deriving a profit from an incorporeal hereditament within the parish, are within the original intention. In the northern metropolis the members of the college of justice, the bench, the bar, and attorneys, are not liable to be rated to the relief of the poor, but this has always been complained of as an injustice, and an act has now passed one house of parliament to remedy this defect. [*Littledale, J.* But there it is done in express words.] It has always been regarded as a grievance that incorporeal hereditaments are

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not within 43 *Eliz.*, and when therefore in a modern act the words of the statute of *Eliz.* are departed from, and language employed which in its strict sense includes incorporeal hereditaments, it must be taken to have been the object of the legislature to remedy the defect complained of? Then is it true that the lord of the manor has no interest? It is his duty to contribute to the relief of the poor, and he has an interest, as connected with his toll, in the cleansing and repairing and paving of the ways. It cannot be denied that the word "hereditament" is used in many parts of this act in its restricted sense, but the question is, what is its meaning in the particular section? [*Littledale, J.* In the latter part of this very section the word "hereditament" seems to be restricted.] It may be doubtful whether it is not so, but as that part relates to a totally different rate, the restriction of the word in that part does not afford the least ground for restricting it in the earlier part of the section. It has been already shewn, that the two cases cited (which can in fact be regarded only as one decision, as they both arose upon the same act of parliament, and in *The King v. Mosley*, the point was treated as *res judicata*) are no authority for restricting the word "hereditament" as used in this section. *The King v. The Trustees of the Streets of Shrewsbury* (a), on the contrary, affords an authority for not restricting the word "hereditament," in a rating clause, to hereditaments *ejusdem generis* with those specially named; for there it was held to include "land," though only "houses and other buildings" had been before mentioned, and it was contended that things *ejusdem generis* with houses and buildings only were included. [*Coleridge, J.* That construction was adopted because meadow and pasture ground were expressly excepted. Had there not been such an excep-

(a) 3 Barnw. &amp; Adol. 216.

tion, implying that other land was included, the word "hereditament" would have been restrained.]

The *commissioners* could not be rated in respect of the tolls, for they have no beneficial occupation.

Sir *W. W. Follett* was heard in reply.

Lord DENMAN, C. J.—I am of opinion that the plaintiff is entitled to judgment, because the rate was improperly made and levied. It is true that in some sense the plaintiff "enjoys a hereditament" within the parish; but the word "hereditament" is to be taken (as in *The King v. Manchester Waterworks Company* and *The King v. Mosley*) with reference to the sense in which it is generally used in the act of parliament. The words here are very large; and so they ought to be to raise any argument for the defendants; for the burthen of proof lies on them, as they seek to establish a new liability, which is not imposed by the act of 43 *Eliz.* I confess I do not see what meaning can be given to the words "tenements and hereditaments," coming as they do after so long an enumeration, unless they apply to incorporeal hereditaments; but, upon the whole, I think they must be restricted to tenements and hereditaments capable of occupation. The words at the end of the section, "such last-mentioned rate to be a pound rate upon or according to the annual rent or value of all messuages, lands, tenements, and hereditaments, as should be held or occupied within such parts of the parish as are not within the said liberties, provided that the same do not exceed in any one year the sum of 1s. 3d. in the pound upon such messuages, lands, tenements and hereditaments," shew that the words in the former part of the section were intended only to comprehend such tenements and hereditaments as are capable of a corporeal holding

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or occupation in particular parts of the parish. It is true that this last part applies to a different rate, yet I think it clear that it was not intended to create an exception as to the subject-matter of the rates.


LITTLEDALE, J.—There is no doubt that the word “hereditament,” in its own legal sense, would reach these tolls. But the question is, in what sense the word is used in *this act of parliament*. In common parlance it means only such hereditaments as are the subject of actual occupation or corporeal enjoyment, and in this act I think that its meaning is restricted to such things as are the subject of actual occupation. The words, as used in the latter part of sect. 53 of the act of 46 *Geo. 3*, c. lxxxix. clearly extend to things of a *local* nature; and if a different construction were put upon the earlier part of the section, there would be great inconsistency. One would suppose, that unless there was some special provision for extending the subject of the rates beyond the statute of 43 *Eliz.* c. 2, it could not have been intended to do so. One would certainly expect some *special* clause. This act of parliament does not appear to me to extend the subject-matter of the rates. The 69th, 70th and 71st sections are confined to things which are the subject of occupation, and throughout I do not see the slightest glimpse of any intimation to make such an extension as that contended for.

PATTESON, J.—The plaintiff is clearly entitled to our judgment. Previously to 1771 the plaintiff, being lord of the manor, was entitled to receive a toll of 2*d.* for every cart or waggon loaded with hay brought into the parish and sold, or offered to sale, on the usual market days. By the 11 *Geo. 3*, c. xv, certain commissioners are to take a toll of 6*d.* and to pay over 2*d.* to the lord.

It is not contended that the lord had become liable in any way in respect of these tolls prior to the passing of the act of 46 *Geo.* 3. In that act are contained the general words upon which the argument for the defendants has been raised, and we are asked by reason of the use of the general word "hereditament," to imply that a new liability was intended to be imposed upon the lord of the manor, that word occurring too in a private and local act made behind his back. It was incumbent on those who wished to impose a new charge to have expressed the matter clearly. If the word "hereditament" was intended to include every thing which might be inherited, why use the previous words? The hereditaments must be *ejusdem generis* with the things specified. The two cases quoted for the plaintiff are decisive upon this point, and the other case does not apply, for there the Court acted upon an *exception* which clearly implied that *land generally* was included.

COLERIDGE, J.—It is not denied that these words have in themselves a large meaning sufficient to include these tolls; but the question is, what is their meaning *here*? The plaintiff says that, looking at this enactment, and the other clauses of the act, they must be restrained to things *ejusdem generis* with those specially named. The defendants say, that the words in this clause are general, and are used for the purpose of making *all* kinds of property really in or arising out of the parish, ratable. We must inquire what was the state of things before the act passed. Before the act the plaintiff was not liable, in respect of such property, to the church and poor rates; and no words expressly imposing a new liability are contained in the act. Such words are requisite, both that the Court may be free from doubt, and that the party

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intended to be charged may have notice before the act passes into a law. The paving rate stands upon a somewhat different footing. That was first imposed by sect. 34 of the act of 11 Geo. 3, and was there clearly intended to be imposed on the holders of corporeal hereditaments only. And as to those rates, it is conceded that the 53d section of 46 Geo. 3, must be limited to hereditaments of a corporeal as well as of a local nature, and we are bound to take into our consideration the use there made of the word "hereditament" in construing the same word as used with reference to the imposition in question. But the onus lies on the defendants, and they were bound to make out the charge satisfactorily. Therefore I think that there must be judgment for the plaintiff.

**Judgment for the plaintiff (a).**

(a) A rector is ratable, as occupier, in respect of tithes for which he receives a money composition; *Rex v. Justices of Sussex*, ante, ii. 236; *Chanter v. Glubb*, 4 Mann. & Ryl. 334, 9 Barn. & Cressw. 479. And see *Rex v. Tremayne*, ante, i. 64; 4 Barn. & Adol. 162; *Rex v. Orford Canal Company*, 2 Mann. & Ryl. Mag. Ca. 588; 10 Barn. & Cress. 163; *Underhill v. Ellicombe*, M'Lel. & Younge, 450; *Rex v. Wistow*, post.



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## The KING v. The Inhabitants of OLDLAND.

ON appeal, an order, by which *Samuel Vox*, his wife and family, were removed from the parish of Monythusloyn, in the county of Monmouth, to the hamlet of Oldland, in the county of Gloucester, was confirmed, subject to the following case:

Some considerable time before the happening of the accident hereinafter mentioned, *S. Vox* being then settled in Oldland, resided in Monythusloyn for the purposes of his employment hereinafter mentioned, and continued to reside there up to the time of the making of the order appealed against. During his residence in Monythusloyn, he was employed in a colliery there, and in the course of such his employment, on the 29th day of May, 1832, his thigh bone was broken. *Vox* was thereupon carried to the nearest dwelling-house in Monythusloyn,—a surgeon was sent for by the parish officers of that parish, and the expense of 10*l.* 2*s.* 6*d.* was incurred by the said parish officers in his cure and maintenance. *Vox* had not been chargeable to Monythusloyn up to the time of the accident, but the surgeon had been employed by the said parish officers to attend *Vox* in consequence of the accident, before the order of removal was made. On the 30th of May, 1832, *Vox*, being by reason of the accident incapable of being removed or brought before any justice, for the purpose of being removed, without endangering his life, his examination was duly taken, and thereupon the order in question was made, and incurred by them in curing and maintaining the pauper during the suspension of the order of removal.

But if such poor person had not come into the parish of B., *animo morandi*, he would have come within the description of *casual poor*, and would not have been removable.

So, if the poor person (*e. g.* a foreigner) had no settlement elsewhere. *Semble.*

A poor person legally settled in the parish of A., who having come into the parish of B. *animo morandi*, there meets with an accident, such as to make it dangerous actually to remove him, or even to take him before a justice to be examined as to his settlement, and becomes chargeable in consequence thereof, cannot be regarded as *casual poor*; and an order for his removal may be made and suspended under 35 *Geo.* 3, c. 101, s. 1 & 2.

And such order being so made and suspended, the parish of A. is bound to pay to the officers of the parish of B. expenses in-

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diately suspended by an order of suspension indorsed thereon. On the 31st of October following, *Vox* being in a fit state to be removed, the same justices took off the suspension, and made an order for the payment by the appellants of 10*l.* 2*s.* 6*d.*, for the expenses incurred under the suspension of the order.

The question for the opinion of this Court is, whether, at the time when the order of removal was made, *Vox* was removable from Monythusloyn, so as to charge the appellants with costs so incurred under the suspension of that order.

*Greaves*, in support of the order of sessions. The pauper was removable under 35 *Geo.* 3, c. 101, s. 1 & 2. Previously to that act, overseers of the poor had, by the 13 & 14 *Car.* 2, c. 12, authority to remove poor persons who had *come to settle* in any parish, and were *likely* to become chargeable. The 35 *Geo.* 3, c. 101, recites the statute of *Charles*, and the inconvenience attendant upon it, and enacts, in the first section, that no poor persons shall be removed until they become *actually* chargeable. The second section authorizes justices to suspend the removal of a sick person, and directs that the charges incurred by such suspension shall be paid by the parish to which the removal is made. (Here he was stopped by the Court.)

*Campbell*, A. G., and *Nicholl*, *contra*. *Fox* was not removable by virtue of 35 *Geo.* 3, c. 101. That act was never intended to throw the costs of maintaining a casual pauper upon any parish but that in which the accident happened. [*Patteson*, J. Can a person, who is the *inhabitant* of a parish, be considered as a *casual* pauper?] If a disabling accident happen to a poor person, the parish in which it happens is bound to be at the ex-

pense of his maintenance, whether he does or does not reside there. Previously to 35 Geo. 3, when an accident happened to a pauper, the parish in which the pauper happened to meet with the accident was bound to maintain him, and not the parish to which he might belong. Thus in *Atkins v. Barwell* (a), it was held that the law will not raise an implied promise in a parish where the pauper is settled, to reimburse the money laid out by another parish, in providing necessary medical assistance; and in that case, notice had been given to the parish where the pauper was settled, that he had been taken ill. The law raises an implied obligation upon the parish where the pauper is taken ill or detained by reason of an accident, to supply his necessities, or to reimburse an individual who takes care of the pauper under such circumstances; and this liability on the parish where the accident happens, cannot be prevented by an actual removal to the parish to which the pauper really belongs; *Lamb v. Bunce* (b), *Tomlinson v. Bentall* (c), *Gent v. Tomkins* (d), *Simmons v. Wilmot* (e). The 35 Geo. 3, c. 101, does not apply to a case where the pauper is physically irremovable. The object of the second section of that statute was not to throw upon a parish a liability which did not previously attach to it. The second section recites, that poor persons are often removed to the place of their settlement during the time of their sickness, to the great danger of their lives, and it enacts, that in case any poor person be brought before any justice of the peace, for the purpose of being re-

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(a) 2 East, 505. And see *Turner v. Watson*, Bull. N. P. 129, 147, 281; *Newby v. Wiltshire*, Cald. 527, 2 Esp. N. P. C. 729.

(b) 4 Maule & Selw. 275.

(c) 8 Dowl. & Ryl. 493, 5

Barn. & Cressw. 738, 4 Dowl. & Ryl. Mag. Ca. 159; *Rex v. St. Lawrence, Ludlow*, 4 Barn. & Ald. 660.

(d) 1 Dowl. & Ryl. 541.

(e) 3 Esp. N. P. C. 91.

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moved from the place where he is inhabiting, and it shall appear to the justice that such poor person is unable to travel by reason of sickness, the justice making the order of removal may suspend the execution of it. This section manifestly applies to those cases only where the pauper is in a condition to be brought, and is actually brought before the magistrates. [*Patteson, J.* By 49 *Geo. 3*, c. 124, s. 4, a magistrate may go to and take the examination of a pauper who is unable to attend upon him.] The pauper was irremovable in this case, because he could not be removed without danger to his life. In *Rex v. St. James, in Bury St. Edmund's* (a), it is said by *Le Blanc, J.*, "It has been properly admitted, that the latter of these statutes, (35 *Geo. 3*.) did not enlarge the power of removing poor persons, but was meant to provide that persons who by law were before removable, if *likely* to become chargeable, should not be removed till *actually* so, and to make provision for suspending the order of removal, when made, in case of sickness or infirmity; and that the expenses incurred in the care and maintenance of the persons, between the order to remove and the actual removal of them, should be defrayed by the parish to which they should be found to belong." [*Patteson, J.* That case was decided on the ground that the pauper was not a person who *came to settle*. Here, the pauper had come to settle in the parish which obtained the order.]

LORD DENMAN, C. J.—This is a perfectly clear case. The pauper had, before the accident occurred, or the order of removal was made, come to settle, within the meaning of the 13 & 14 *Car. 2*, in *Monythusloyn*. Previously to 35 *Geo. 3*, a person who had so come to

(a) 10 East, 25.

inhabit, if *likely to become* chargeable, was removable. The 35 Geo. 3 altered the law in that respect, and permitted the removal to take place only where the party was *actually* chargeable. It appeared to the legislature that there was some danger that a pauper who became chargeable by illness might be removed too soon, and the statute therefore gives power to the magistrates to suspend the order, if it shall appear to them that the pauper is unable to travel by reason of sickness or other infirmity, or that it would be dangerous for him so to do. "Other infirmity," I apprehend, means any infirmity, however occasioned, and therefore includes an accidental injury like that in the present case. There was another danger to be prevented. The party might be taken before a magistrate to be examined as to his settlement, before he was in a fit state to go out. This occasioned the fourth section of 40 Geo. 3, c. 124, which provides that whenever any pauper is by age, illness, or infirmity, unable to be brought up to the petty sessions, to be examined as to his settlement, any one magistrate acting for the district where the pauper may be, may take his examination. The present is the converse of *Rex v. St. James, in Bury St. Edmund's*. The decision in that case proceeded on the ground that the party had not come to settle and inhabit, within the meaning of the statute of *Charles*. Here, he had come to settle and inhabit.

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LITTLEDALE, J. concurred.

PATTESON, J.—I think the order was valid. To hold otherwise, would be to decide in direct opposition to the act of 35 Geo. 3. Undeniably the pauper might have been removed if that removal could have taken place

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without danger to his life. He was an *inhabitant*; he had *come to settle*, and was *actually chargeable*. It is immaterial whether he became chargeable in consequence of an accident, or from any other circumstance. It is said that the pauper was not removable because he was liable to be maintained by the parish in which the accident occurred. If indeed it had happened that he was *casually* in the parish, then no removal could have taken place, because the statute of *Charles* only authorizes the removal of persons who have *come to settle*. In that event he would have been a casual pauper. I do not agree with the definition, that casual poor are poor persons made chargeable to parishes by meeting with accidents in such parishes. A person who is *resident* in a parish, and becomes chargeable by reason of having met with an accident, cannot be considered as a casual pauper. I do not however mean to lay down that a foreigner, who resided in a parish, and who there met with an accident and became chargeable, might not be considered as a casual pauper.

COLERIDGE, J.—The question is, whether the pauper was removable at the time when the order was made, so as to charge the parish to which the pauper belonged with the cost of his maintenance, during the period of the suspension of the order of removal. First, then, was the pauper removable? If by this question it is meant to ask whether the magistrates could make a valid order of removal, I say that undoubtedly they could. The magistrates might have gone, if it had been necessary, and examined the pauper, as to his settlement. He had come into the parish *animo morandi*, and he was chargeable. But although the order might be made, it could not be carried into effect, on account of the infirmity of

the pauper. The 35 Geo. 3 was passed for the very purpose of providing for this state of circumstances. It empowers the magistrates to suspend the order, and imposes the expense of maintaining the pauper during the time of suspension, on the parish to which he belongs. The only remaining question is, whether the order of suspension could be made. It is shewn that the pauper was incapable of being removed without danger to his life, in consequence of infirmity; and this being so, it follows, of course, that it was the duty of the justices to direct that the execution of the order should be suspended.

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Order of Sessions confirmed.

END OF EASTER TERM.

## TRINITY TERM,

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## The KING v. The Inhabitants of MAIDSTONE.

A., a parish apprentice, having a general permission from B., his master, to seek employment in trade elsewhere, serves C., in the parish of Dale, and resides there forty days before the 1st October, 1816, (when the 56 Geo. 3, c. 139, came into operation,) without the knowledge of B. B., subsequently to 6th October, assents to such service:—Held, that such subsequent assent to the service with C. does not relate back to the commencement of it, so as to make the service in Dale referable to the indenture.

AT the Quarter Sessions holden for the city of Canterbury, the parish of Maidstone appealed against an order of justices, by which *Benjamin Drywood* and his family had been removed to that parish as the place of their settlement. The sessions confirmed the order, subject to the following case:—

The pauper, *Drywood*, was, in June, 1814, bound as a parish apprentice to one *Pollard*, of Milton, basket-maker, with whom he lived under the indenture at Milton until August, 1816, when *Pollard* failing, and having no means of employing him, *Drywood* expressed a wish to go and endeavour to procure work in the basket-making business, and mentioned Maidstone as a place where it was likely to be procured. There were at that time several basket-makers in Maidstone, but no mention was made of the name of any of them. *Pollard* consented to the pauper's going, but said that if he got work, he (*Pollard*) should expect to be allowed a trifle out of his wages. To this the pauper assented, and he thereupon left Milton. *Pollard* heard no more from *Drywood*, nor did he make any inquiry about him; but having occasion to go to Maidstone in November or December in the same year, he casually heard from a traveller that *Drywood* was then working with a basket-maker named *Peters*, in that town; and he called on

So, also, if the act of 56 Geo. 3, c. 139, had not passed, *semble*.

*Peters*, and found him there; and it appeared that he had worked and resided there upwards of forty days before the 1st October, 1816, on which day the stat. of 56th Geo. 3, c. 139, came into operation. *Pollard* then asked for a portion of *Drywood's* wages, but being told by *Peters* that the wages were barely sufficient for *Drywood's* support, he went away. The pauper continued after this to work for *Peters*, and to reside in Maidstone several months, when he left that place, but he never returned into *Pollard's* service, or paid him any thing on account of what he earned.

The question is, whether the service and residence of *Drywood* with *Peters* were sufficient to confer a settlement in Maidstone.

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*Kelly* and *Shee*, in support of the order of sessions. The service at Maidstone was a good service under the indenture. Nothing was done to put an end to the indenture, or to the relation of master and apprentice; and the service of the apprentice with the basket-maker at Maidstone was assented to by his master. In all the cases in which it has been held that the second service was not referable to the indenture, something had been done to put an end to the relation of master and apprentice. In *Rex v. Banbury* (a) the pauper had been apprenticed to *A.*, to be instructed in his trade, and provided with meat and other necessities. *A.* having failed in business, and having no employment for the apprentice, advised him to go if he could get a place, and mentioned that *B.* (who was in the same trade) wanted hands, and said that he might go and work with *B.* if he liked, and that if he did not become troublesome to him, *A.*, or the parish, till the end of his time, he should

(a) *Ante*, vol. i. 148; 5 Barnw. & Adol. 176.

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have his, *A.*'s watch. The apprentice accordingly applied to *B.*, who employed him at piece work, out of the profits of which he provided himself with necessaries. Afterwards, with the assent of *A.*, he removed from the service of *B.* into that of *C.*, whom he also served in the same trade. At the end of the period of his apprenticeship, *A.* gave him the watch. It was held by *Denman, C. J., Littledale, J., and Patteson, J.,* (dissentiente *Parke, J.*) that the service with *B.* and *C.* was referable to the indenture, and that the apprentice gained a settlement in the parish in which he inhabited during such service. The only distinction between that case and the present is, that there the assent of the master to the pauper's working with the particular tradesman was given in the first instance; whereas here the assent, which is clearly to be implied from the master's conduct, was given after the service. But the subsequent assent is a *ratihabitio*, and has reference back to the commencement of the service with the second master; and besides, there are in this case several facts which more than compensate for the absence of original assent to the working with the particular master. Here, as in *Rex v. Banbury*, the master had failed in business; he consented to the apprentice's seeking employment in his trade at Maidstone, though no particular master was originally named; and he stipulated that the apprentice should allow him something out of his wages, which was agreed upon; thus clearly proving that a continuance of the relation of master and apprentice continued, and that it was considered by both parties that the master would still have it in his power to compel the apprentice to return into his service. When the master learnt with whom the apprentice was serving, he assented to the service, and asked for a portion of the wages as stipulated for. This assent is a *ratihabitio*, and is evidence of an assent of

the master to the particular service at the period of its commencement. In no case has it been decided that the assent of the master to the particular service must precede it, in order to make it a service referable to the indenture. On the contrary, in *Rex v. Bradstone* (a) and *Rex v. Bradninch* (b), a subsequent assent or ratihabitio was held sufficient. *Rex v. Whitchurch* (c), *Rex v. Crediton* (d), and *Rex v. St. Helen, Stonegate* (e), may be cited contra; but in all those cases either there was no assent at all, or the assent was to a total dissolution of the relation of master and apprentice, and therefore those cases are distinguishable from the present. If the assent given in this case had relation back to the commencement of the apprentice's service with *Peters*, then there had been a service for forty days in Maidstone, under the apprenticeship, previously to 1st October, 1816, on which day the act of 56 Geo. 3, c. 139, came into operation.

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*Bodkin*, contra. Before the passing of 56 Geo. 3, c. 139, a parol assignment over of an apprentice by his master was held sufficient, but at the same time an assignment was held *necessary* in order to enable the apprentice to acquire a settlement by service with the second master. By 56 Geo. 3, c. 139, s. 9, it is enacted, that from and after 6th October, 1816, "it shall not be lawful for any master or mistress to put away or transfer any parish apprentice to any other, or in any way to discharge or dismiss from his or her service any parish apprentice, without such consent of justices as is directed in an act passed, &c. (32 Geo. 3, c. 57,) and that no

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| (a) 2 Bott's P. L. 422.       | Barnw. & Cressw. 574; 1 Dowl. |
| (b) 2 Bott's P. L. 418; S. C. | & Ryl. Mag. Ca. 452.          |
| Caldecott, 461.               | (d) 1 East, 59.               |
| (c) 2 Dowl. & Ryl. 845; 1     | (e) 1 East, 285.              |

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settlement shall be gained by any service of such apprentice, after such putting away or transfer, unless such service shall have been performed under the sanction of such consent as aforesaid;" and it is submitted that no service was gained in Maidstone by the pauper before the 1st October, 1816, for that the previous service with *Peters* was not under any assignment over of the apprentice. Through the whole of the cases this principle runs,—that there must be an assent of the first master to the particular service; and there are cases in which it was held, that *knowledge* by the first master was not sufficient, but that there must be an actual *assent*. Here, there was an absence of assent and of knowledge too. In *Rex v. Crediton* (a) the Court decided that the service with the second master did not confer a settlement, because the first master had only given a general consent to the apprentice's going where he pleased, without assenting to the particular service; whilst, on the other hand, the same judges, a few days afterwards, came to a contrary decision in *Rex v. Shebbear* (b), on the ground that there the master had expressly assented to the particular service. In both those cases it was laid down as an undoubted rule, that the indenture must continue in force, and that the original master must expressly assent to the particular service with the second master. It is not intended to dispute that in this case the apprenticeship still existed in point of law, but only to contend that the service with *Peters* was not under an assignment over from the original master. The assent of the first master must precede the service with the second. The case of *Rex v. Bradstone* bears out no such proposition as that for which it was cited; for in that case, though the assent was given after the entrance of the apprentice upon the service of the second master,

(a) 1 East, 59.

(b) 1 East, 73.

yet there was a subsequent service of four months with the second master. In *Rex v. Whitchurch* (a) it is said by the Court, "It has been urged that the subsequent assent of the first master is sufficient to make the second service a service under the indenture; but the contrary is established by *Rex v. St. Helen, Stonegate* (b)." Here, it is argued that the mere fact of the master accidentally finding his apprentice working for wages with another master, and asking for a portion of those wages, as he had stipulated when he gave his general consent to the apprentice's seeking work elsewhere, (and this, too, occurring after the 1st October, 1816,) is to have the same operation as an express assent originally given to the particular service. To this proposition all the authorities are opposed.

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LORD DENMAN, C.J.—The case of *Rex v. Banbury* was not intended to interfere with the former decisions. We intended to bear out what was said by the Court in *Rex v. Whitchurch*. It is clear that in this case the apprentice was in the service of another master without the express assent of the original master, unless we can import into this matter the notion of a *ratification* by subsequent assent. It appears to me that we cannot do that. At all events there was no assent before the passing of the act of 56 Geo. 3; and no assignment since that time is valid unless made with the assent of justices. It appears to me therefore that no settlement was gained in Maidstone.

LITLEDALE, J.—I am of the same opinion. Before the passing of 56 Geo. 3, c. 139, it was considered that

(a) 2 Dowl. & Ryl. 845; 1 & Ryl. Mag. Ca. 452.  
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when there was an express assent of the original master to the service of the apprentice with a particular second master, there was something in the nature of an assignment; and on that ground it was that a service with the second master was in such cases held to be referable to the indenture. Now here the first master knows nothing as to whom the apprentice is to go to. He merely consents to the pauper's going to seek employment in Maidstone, and says that if he succeeds in getting work, he (the master) shall expect to be allowed a trifle out of his wages. There is nothing at all approaching to an assignment in this case. As to the *ratihabitio*, that took place in November or December, 1816, after the act of 56 Geo. 3 had come into operation, and had put an end to informal assignments of parish apprentices. The settlement should have been completely gained before the passing of the act.

PATTESON, J.—The question is, whether there was an assent of the first master to the particular service. In *Rex v. Banbury* no such question arose. Here, the question is in fact whether the assent of the first master, in November or December, 1816, is to have relation back, and to have effect from the beginning of the service with the second master. I find no case that goes that length. In *Rex v. Bradninch* there was a service and residence for more than forty days subsequent to the assent. Here, there was no subsequent service and residence which could possibly confer a settlement. Unless we can say that the assent in November or December has relation back, no settlement was gained in this case; for in the first instance the master permitted the apprentice to go where he pleased. I think that we cannot so hold; and therefore I am of opinion that there is no sufficient assent to the particular service.

WILLIAMS, J.—The principle upon which settlements have been held to be gained by service with a second master is, that the service was a service under the original indenture. It is reasonable therefore to require that the master should know with whom his apprentice was serving, and should assent to that service. In *Rex v. Banbury* the master pointed out a person, and advised the apprentice to go to him. That is wanting here. The original assent is not sufficient; and with regard to the subsequent assent, I decline giving any opinion as to whether, if the act had not passed, that would have been sufficient; but I think it clear that the assent subsequent to the act could not affect the service previous to it.

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Order of Sessions quashed.


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ON appeal against an order for the removal of *James Price*, his wife and child, from the parish of St. Clement to the parish of Witney, both in the county of Oxford, the order was confirmed, subject to the following case:

By an act of 11 *Geo. 3*, c. 14, intituled, "An Act for better regulating the Poor within the city of Oxford," the mayor, recorder, aldermen, assistants, town clerk, and solicitor, of the said city, for the time being, and also certain persons to be elected in manner therein mentioned, are incorporated by the name of "The person residing in a parish within the county, out of the city, the order for and allowance of the indenture need only be under the hands of two justices for the county."

Where a poor child, belonging to a parish within a city which has a local commission of the peace, but over which the county justices have a concurrent jurisdiction, is bound apprentice, by the parochial authorities, to a

Where a parish indenture of apprenticeship appears on the face of it to be ordered and allowed by justices under 56 *Geo. 3*, c. 139, s. 2, it is *prima facie* to be presumed that the notice required by that section was duly given, and was proved before the magistrates by whom the indenture was allowed.

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Guardians of the Poor within the City of Oxford." And by sect. 16, the said guardians are empowered, at any monthly or special court, by writing, under seal, to bind and put forth any poor child maintained by them, apprentice to any reputable person in England; and it was declared that every such writing should be virtually binding as an indenture between the master or mistress and apprentice, and the apprentice should be entitled to gain a settlement, and should in all respects be enforced according to the laws in force concerning the binding out of poor children apprentices, whose parents are not able to provide for them.

On the part of the respondents, (St. Clement's,) a deed of apprenticeship, under the seal of the guardians, was put in, bearing date 7th March, 1822, by which the pauper, *James Price*, was apprenticed to *Thomas Harris*, a watchmaker, in the appellants parish of Witney, and the following is an extract from the material part of such deed:—"Know all men by these presents, that 'The Guardians &c.' incorporated by and under a certain act of parliament, made &c., intituled &c., by and with the consent of his Majesty's justices of the peace for the county of Oxford, whose names are hereunder subscribed, and by virtue and in pursuance of an order in writing, made by and under the hands and seals of *W. H. Ashurst* and *J. Phillips*, Esqrs., justices &c. in and for the said county, dated 2d March, 1822, pursuant to the statute in that case made and provided, have, at their monthly court, holden on this 7th day of March, 1822, pursuant to the powers &c. in and by the aforesaid act of &c. in them vested and reposed, put forth, and by this present writing do bind and put forth *James Price*, (a poor child, maintained by the said guardians, and now under their government, aged fourteen years,) apprentice to *Thomas Harris* of Witney, in the county of Oxford, watchmaker,

(a reputable person,) with him to dwell and serve, from the day of the date of these presents, for and during and until the said apprentice shall attain the full age of twenty-one years."


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The original order of the two justices of the county of Oxford, for the binding, was annexed to the indenture, and at the foot of the indenture appeared an allowance of the apprenticeship, by the same two justices, describing themselves as justices acting in and for the county of Oxford, (whereof one is of the quorum).

The deed of apprenticeship was not allowed by any other than the said two justices, who were justices of the county of Oxford, (and whose jurisdiction, as after explained, overrides the city,) but not justices of the city of Oxford.

The city of Oxford then had justices of its own, under the authority of two several commissions, issued under the great seal, one being a commission of gaol delivery, and the other of the peace, and which are severally directed to certain noblemen and gentlemen of the county, and to the mayor, recorder, aldermen, and assistants of the city, but the administration of justice under such commissions has hitherto been conducted by the mayor &c. of the said city only, and they also have alone been accustomed to qualify as justices for the city. The justices of the county of Oxford, however, have a concurrent jurisdiction in the city of Oxford, excepting only within that small part of it which is locally situate in Berkshire, where the justices of that county have a like concurrent jurisdiction.

It does not appear by the deed of apprenticeship, or any indorsement thereon, nor was it made to appear at the hearing of the appeal, that any notice of the apprenticeship had been given to the overseers of the appellant

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parish, or that any overseer of the appellant parish had attended before the justices, and admitted such notice.

The execution of the deed by the guardians, by affixing their common seal, was proved by the attesting witness, the then clerk to the guardians; but no evidence whatever was given by the respondents with respect to the notice.

The pauper served more than forty days under this apprenticeship deed, in the parish of Witney.

The questions for the opinion of the Court are,—1<sup>st</sup>, whether the order for the apprenticeship ought not to have been made by justices of the *city* of Oxford; 2<sup>dly</sup>, whether there ought not to have been an allowance of the indenture by justices of the said city; 3<sup>dly</sup>, whether, under the circumstances, it was incumbent on the respondent parish to prove that notice of the intended apprenticeship had been given to the appellant parish, before the allowance of the indenture, or that an overseer of that parish had attended before the allowing justices and admitted such notice.

*Maule* and *C. C. Cooper*, in support of the order of sessions. The county justices had jurisdiction, and therefore the order and allowance by these two justices was sufficient. There is no reason whatever for saying that the city justices,—who have no more than a concurrent jurisdiction,—should have ordered and allowed the indenture; but on the contrary, as the city justices were themselves parties to the indenture, as being members of the corporation of the guardians of the poor, it would have been *improper* in them to use any judicial power in this matter. The place in which the party to whom, and the place by the officers of which, the pauper was bound, are both within the same jurisdiction, and therefore the case does not come within 56 *Geo.* 3, c. 139,

s. 2. The third section shews clearly an intention to throw jurisdiction of this sort into the hands of the county justices, in preference to local justices; for by that section it is enacted, that the allowance of two justices of the peace for the county, within which the place in which such child shall be intended to serve an apprenticeship shall be situated, shall be valid and effectual, although such place shall be situated in a town or liberty within which any other justices of the peace may in other respects have an exclusive jurisdiction.

It was not necessary for the respondent parish to prove that notice of the intended apprenticeship had been given to the appellant parish, before the allowance of the indenture, or that an overseer of that parish had attended before the allowing justices, and admitted such notice. It is to be presumed *prima facie*, that the justices complied with the directions of the statute, and that they did not sign the allowance until they had due proof of the notice. [*Patteson, J.* Is any notice required by the enactment in this statute, where the two parishes are within the same jurisdiction?] Yes: It was so held in *Rex v. Threlkeld (a)*, upon which, probably, the objection in this case is founded. In that case, however, it was proved as a fact, that no notice had been given, so that the doctrine of presumption could not apply. In no case has it ever been held that the sessions are bound to satisfy themselves by evidence, that all matters preceding the allowance were rightly done. On the contrary, it is in general to be presumed, in the absence of negative proof, that all due formalities were observed, and other requisitions of law, complied with by the justices; *St. Devereux v. Much Dew Church (b)*. *Rex v. Haslingfield (c)*, and *Williams v. The East India Company (d)*.

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(a) *Ante*, i. 3; 4 Barn. & Adol. 229.

(b) 1 W. Bla. 367.

(c) 2 Maule & Selw. 558.

(d) 3 East, 192.

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[Lord Denman, C. J. I think this point has very lately been decided by us (a).]

*R. V. Richards and Chilton, contra.* It is impossible to distinguish this case from *Rex v. Newark-upon-Trent* (b), and *Rex v. Threlkeld* (c). [Lord Denman, C. J. There is no doubt that the notice was necessary; and that if no notice was proved before the justices, they did wrong in allowing the indenture. But we have decided in the late case to which I have adverted, that *prima facie* the notice and the proof of it are to be presumed.]

The other point depends upon a critical examination of the act. The case comes within the mischief mentioned in the preamble of the statute, and comes also, it is submitted, within its enactments. It is expressly found that the two justices, by whom the indenture was ordered and allowed, were not justices of the city of Oxford. The city of Oxford is a different jurisdiction of the peace from the county of Oxford, although it is true that the county justices have a concurrent jurisdiction within the city. This resembles the case of justices who are in the commission of the peace for two adjoining counties; and it was held in *Rex v. Shipton* (d), that when a poor child is bound by the officers of a parish in one county, to a master residing in another county, the indenture must be allowed by two justices of each county, being distinct persons, and that an allowance by the same two persons, in their distinct characters of justices for both counties, is insufficient. Part of the city

(a) In *Rex v. Whiston*, ante, 514.

(b) 4 Dowl. & Ryl. 745; 3 Barn. & Cressw. 59; 2 Dowl. & Ryl. Mag. Ca. 366.

(c) Ante, i. 3; 4 Barn. & Adol. 229.

(d) 2 Mann. & Ryl. 217; 8 Barn. & Cressw. 88; 1 Man. & Ryl. Mag. Ca. 394.

is within Berkshire, and it is not stated that the parish of St. Clement is not in that part of the city which is within that county. [*Littledale, J.* We cannot intend that it is within Berkshire.] By the late act of 3 & 4 Will. 4, c. 63, after reciting that doubts had arisen whether, under 56 Geo. 3, c. 139, the allowance of two justices, although they act as justices for both counties, is valid and effectual, or whether it is not necessary that such indenture should be allowed by four justices, two acting for one county, and two for the other county, it was enacted, that thenceforth all indentures for the binding of parish apprentices, which had been previously to the passing of that act allowed, and should thereafter be allowed by two justices of the peace, acting as well for the county or district within which the place by the officers of which such child should be bound should be situated, as for the county or district within which the place should be situated wherein such child should be intended to serve, should be deemed as good, valid, and effectual, as if the same had been allowed by two justices acting only for each of such counties or districts. It will be seen that throughout this enactment the legislature speak of justices *acting* for a particular county or district, and do not speak, in the more general terms of the act of 56 Geo. 3, c. 139, of different *jurisdictions*. The act of 56 Geo. 3, must be read as explained by that of 3 & 4 Will. 4. And so read, it is submitted that this case will come within its provisions; for Oxford is a separate district, in which, though the county justices may have a concurrent *jurisdiction*, the city justices alone *act* as magistrates. The third section of the act does not touch the present case, as here the peculiar jurisdiction is in the place in which the binding parish is situate, not in the place in which the intended master resides.

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LITLEDALE, J. (a).—The point as to the notice was decided in last Hilary term, and was well decided. The two justices are not to allow the indenture, unless the notice has been given; and it is to be presumed that they have done their duty in this respect. This is a very convenient rule. I do not mean to say, of course, that the party opposing the settlement under the indenture, may not be admitted to prove the negative, but only that *prima facie* it is to be presumed that the justices would not have signed the indenture unless the notice had been satisfactorily proved before them.

Then with respect to the other question. I think there is no pretence for saying that Witney is in a different jurisdiction from St. Clement's, Oxford. And even if the jurisdiction of the city of Oxford had been *exclusive* for other purposes, yet the third section would operate to make the allowance by the two county justices sufficient. The jurisdiction of the city of Oxford is both different from and the same with that of the county. It is different as regards the city justices, but the same as regards the justices for the county.

PATTESON, J.—I have not the least doubt on either point. By a different jurisdiction is meant an exclusive jurisdiction,—a jurisdiction that is quite separate from the other. Here, there is nothing but an *additional* jurisdiction in the city magistrates. It was suggested that the child might have been bound from that part of the city which is within Berkshire. The contrary appears from the order.

The other point was decided by a case in last Hilary term. I was not in this Court during that term. But I quite agree with the decision in that case, upon the

(a) Lord Denman, C. J. had left the Court before the conclusion of the argument.

point of notice. We must take it, unless the contrary is shewn, that no magistrate would think of putting his hand and seal to the indenture unless the notice had been given.

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WILLIAMS, J.—The justices could not properly have allowed the indenture, unless the notice had been given. We must therefore presume the notice.

With regard to the other point: The allowance is good. The jurisdiction of county justices over the city is not affected by the concurrent jurisdiction of the city justices.

Order confirmed.

—◆—  
 REX v. The Inhabitants of COWPEN.

ON appeal against an order for the removal of *William Dodds* and *Ann* his wife, and their six children, from the parish of St. Nicholas, in the town and county of Newcastle upon Tyne, to the township of Cowpen, in the county of Northumberland, the sessions confirmed the order, subject to the following case:

The pauper, *William Dodds*, (then being unmarried,) with others, was hired to the proprietors of Cowpen colliery by a written agreement, bearing date the 5th day of April, 1816, from the day of the date thereof until the 5th April, 1817, to hew, work, fill, and drive coals, and *A.* hires men from 5th April, 1816, to 5th April, 1817, to hew, work, fill, and drive coals, and to do such other work as shall be necessary for the carrying on of *A.*'s colliery, and as they shall be required and directed to do by *A.*; the men to receive 2s. 6d. for each day that they shall be laid idle (be unemployed) by *A.*, except on the pay-Saturdays, when the pit is going single shift (working twelve hours); but the pit going double shift (working twenty-four hours), the men to work one shift, in order to make each shift work eleven days (i.e. in a fortnight), and, except when prevented by sickness or other unavoidable cause, to do and perform a full day's work on every working-day, except a single shift on the pay-Saturdays, and in default thereof, for every such default to pay 2s. 6d. to *A.*:—Held, that in this hiring there was an exception of pay-Saturdays and Sundays, and that therefore no settlement was gained by service under such hiring.

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to do such other work as should be necessary for the carrying on the said colliery, and as they should be required and directed to do by the owners, &c. at the respective prices, and on the following, amongst others, terms and conditions therein contained :—That the sums or forfeitures required to be paid by the said parties thereby hired for such days as they should respectively lay themselves idle, should be respectively paid to them to the same amount by the proprietors of the said colliery, their executors, &c. for each and every day they should be laid idle by the proprietors of the said colliery, their executors, &c. or their agent, except on the pay-Saturdays, when the pit is going single shift, but a pit going double shift, the men must work one shift on the pay-Saturdays, in order to make each shift work eleven days. That the said parties thereby hired shall, except when prevented by sickness or other sufficient or unavoidable cause, do and perform a full day's work *on each and every working day except a single shift pit on the pay-Saturdays*, or such quantity of work as should be deemed fairly equal to a day's work, and should not leave their work until such day's work or quantity of work is fully performed or finished to the extent of each man's ability; and in default thereof each of the said parties thereby hired and so making default should, for every such default, forfeit and pay the said proprietors of the said colliery, their executors, administrators or assigns, 2s. 6d. And it was further agreed by the proprietors of the said colliery, their executors, &c. that every hewer, putter, or driver, or other workman, should be paid his respective earnings or wages every fourteen days, subject, nevertheless, to such deductions as were therein mentioned. And it was thereby mutually agreed, that in case any dispute or difference should arise between the said parties relative to any matter or thing not thereby provided

for, such disputes or difference should be submitted to the decision of two viewers of collieries, one to be appointed by the proprietors of the said colliery, their executors, &c., and the other by the said parties of the other part; and in case of their disagreement, to the decision of a third person, to be appointed by such viewers; and the judgment or decision of such two viewers or umpire, as the case should happen, should be conclusive between the parties in the matter referred to them. And it was thereby declared that nothing therein contained should extend, or be construed to extend, to alter, prejudice, lessen, or otherwise affect the legal remedies and powers which by law belong to masters and servants in their respective relation to each other, or to magistrates having jurisdiction in case of dispute or difference between them.

The pit in which the pauper was employed sometimes worked single shift and sometimes double shift. The pauper worked from the said 5th April, 1816, to the 5th April, 1817, under the said agreement, sometimes single shift and sometimes double shift. He married in May, 1816, and resided the whole year in the appellants' township. Pay-Saturday is every alternate Saturday, being the next Saturday after the day on which the earnings are paid. The ordinary day's work of a pit is twelve hours, which is called a shift, and when all the men are employed at the same time, and the working of a pit does not continue longer than twelve hours in the day, a pit is then said to be a pit working or going single shift. It frequently happens that it is necessary that the working of a pit should be carried on all the twenty-four hours, in which case the complement of men and boys are divided into two sets or gaugs, called "shifts." These shifts relieve each other every twelve hours. When this is the case, a pit is said to be working or

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going double shift. Of these shifts the one is called the fore shift, and the other the back shift. The fore shift begins work at two o'clock on the Monday morning, and works twelve hours on that morning and every morning during the fortnight, except on the Saturday morning in the second week of the fortnight, which is the pay-Saturday. The back shift begins work at two o'clock on the Monday afternoon, and works twelve hours on that afternoon and every afternoon during the fortnight, except the Saturday afternoons, when it does not work. In such a course of working the fore shift has worked eleven shifts or days' works, and the back shift ten shifts or days' works. In the second fortnight the shifts are changed, the fore shift of the fortnight preceding becomes the back shift of this, and the back shift of the fortnight preceding becomes this fortnight's fore shift. The fore shift of this fortnight begins work at two o'clock on Monday morning, and works twelve hours on that morning and every morning during the fortnight, except on the Saturday morning in the second week of the fortnight, which is the pay-Saturday. This shift works eleven shifts or days' work this fortnight, which, with ten shifts of the fortnight preceding, make twenty-one shifts or days' works. The back shift of this fortnight begins work at two o'clock on the Monday afternoon, and works twelve hours on that afternoon and every afternoon during the fortnight, except on Saturday afternoon. The back shift works ten shifts or days' works during this fortnight, which, with the eleven shifts of the fortnight preceding, makes twenty-one shifts or days' works. The words "but a pit going double shift the men must work one shift on the pay-Saturday in order to make each shift work eleven days," are applicable only to the men forming the fore shift of the second week in each fortnight, who have worked twenty-one shifts in the two

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fortnights, and who, under this clause, begin work at two o'clock on the pay-Saturday morning, and work twelve hours, which make twenty-two shifts or days works for two fortnights, or eleven shifts or days works for one fortnight. It sometimes happens when a pit is working ~~double~~ shift that some job of necessity occurs, which requires a few individuals to remain down the pit after the shift of men to which they belong have finished their work and the next shift has commenced work. This is technically called "standing double shift." This only applies to individuals,—rarely, if ever, to the whole pit's crew (a).

*T. Greenwood*, in support of the order of sessions. The question in this case is, whether this was an *exceptional hiring*. This case consists of two parts. The first part is the contract under which the pauper was hired: the second part is an explanation of the manner in which the pit is ordinarily worked. It is apprehended that the question will depend entirely upon the *contract*, and that the Court will not look to the subsequent statement of the mode of working the pit in practice in the same way in which they are in the habit of considering the *custom of the country* in which a contract is made. The contract is not qualified or limited by the practice. The objections taken will probably be the following:—1st, that the men have, under this contract, the right to "lay themselves idle" on payment of the fine, and thus exempt themselves from the master's control: 2dly, that when they have done a "full day's work," they become their own masters: 3dly, that by the mention of each and every working-day, there is an implied exception of days other than working days: 4thly, that there is an excep-

(a) This case does not appear to have been drawn by counsel.

It was signed only by the Clerk-man of the Sessions.

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tion of pay-Saturday. To the first two of these objections *Rex v. Byker* (a) is a conclusive answer; and *Rex v. St. Helen's, Auckland* (b), and *Rex v. Ouset-cum-Gawthorpe* (c), are also in point. Then, as to the third objection; in *Rex v. Byker* the same words occur; for there it was stipulated that for every *working day* which the workmen or any of them should absent themselves from their employment, or should neglect or refuse to fulfil and execute the whole of the business of an usual day's work, unless prevented by sickness or some other unavoidable cause, the defaulters should forfeit and lose the sum of 2s. 6d.; and yet in that case the contract was held not to be exceptive. In *Rex v. St. Helen's, Auckland*, *Rex v. Byker* was fully considered, and was recognized as good law. Then, as to the mention that is made of pay-Saturday,—the intention of the parties is obviously nothing more than this; that as on the days on which the wages are paid the masters must necessarily be occupied in paying the wages, and the labourers in receiving them, the men shall not in general be liable to be fined for not working on that day, and that, on the other hand, the masters, being themselves occupied on that day, shall not be liable to pay the men for “laying them idle.” It does not at all follow from this that the men were not in fact under the control of their masters on the pay-Saturday. On the contrary, it clearly appears from the whole contract, that it was contemplated on both sides that the men were hired for all their time, and were to have none at their own absolute disposal. The men were hired from the 5th April, 1816, to 5th April, 1817, to hew, work, fill, and drive coals, and to do such other work as should be necessary for the carrying on

(a) 2 Barnw. & Cressw. 114; Mann. Mag. Ca. 108.  
 3 Dowl. & Ryl. 330; 2 Dowl. & Ryl. Mag. Ca. 15.  
 (b) 1 Nev. & Mann. 462; 4 Barn. & Adol. 718; 1 Nev. & Mann. Mag. Ca. 10.  
 (c) 1 Nev. & Mann. 21; 4 Barnw. & Adol. 218; 1 Nev. & Mann. Mag. Ca. 10.

the colliery, and as they should be required and directed to do by the owners; and the "terms and conditions," mentioned in the contract, were merely regulations necessary for the profitable working of the mine, and for regulating the amount of wages, &c. The masters were at liberty to call upon the men at any time to do extra work. The men were bound at all times to do such work as the masters should deem necessary for the carrying on of the colliery, and should require them to do. If so, they were never exempt from control,—were never masters of their own time. Even regarding it as part of the contract, that on pay-Saturdays some portion of the men were not to be required to work in the mine, still it was entirely in the discretion of the masters on what pay-Saturday a particular man should work, and on which he should be exempt. Upon the whole, it is submitted that this case falls within the principle of *Rex v. Byker (a)*, *Rex v. St. Helen's, Auckland (b)*, and *Rex v. Ossett-cum-Gawthorpe (c)*; for that the Court cannot point to any specific period of the year, whether for a day or an hour, when the men would, under this contract, be entirely exempt from the control of their masters. On this ground this case is distinguishable from *Rex v. Gateshead (d)* (supposing that case not to be overruled by *Rex v. Ossett-cum-Gawthorpe*, which it is submitted that it is), *Rex v. Birmingham (e)*, and *Rex v. Frome Selwood (f)*, which will probably be referred to on the other side.

*Cresswell and Hedley*, contra. This is an exceptive hiring. This case is governed by *Rex v. Gateshead*,

(a) *Suprà*, 678.

(b) *Ibid.*

(c) *Ibid.*

(d) 3 Dowl. & Ryl. 333, n.;  
2 Barnw. & Cressw. 117, n; 2

Dowl. & Ryl. Mag. Ca. 17, n.

(e) 4 Mann. & Ryl. 691; 9

Barnw. & Cressw. 925; 2 Man.

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(f) 1 Barnw. & Adol. 207.

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which is indeed not so strong a case as this. In that case it was stipulated that each man should do on each *working-day* such a quantity of work as should be deemed equal to a full day's work, and should not leave the pit until that quantity was completed, or in default thereof should forfeit 2s. 6d.; and it was held that the expression, "each working day," intimated that there were days when no work was to be done; and therefore the contract was considered to be an exceptive hiring. Here there is a plain exception of pay-Saturday. It seems that on pay-Saturday the men are not to work at all when the pit is working single shift, and only one half of them when the pit is working double shift. When the pit is going double shift, each man is exempt from work on alternate pay-Saturdays. The men are neither to work nor to be paid on the pay-Saturday. There is nothing whatever to shew that on that day the relation of master and servant existed. Much less is there any thing in the contract giving the masters any sort of control over the men on *Sundays*. On the contrary, the contract appears to be expressly confined to working-days. Even on working-days there is nothing but a fine to compel the men to work. On all these grounds this case is perfectly distinguishable from *Rex v. Byker* and *Rex v. St. Helen's, Auckland*, and falls within the principle of *Rex v. Gateshead* (which was recognized in *Rex v. St. Helen's, Auckland*), *Rex v. Birmingham*, and *Rex v. Frome Selwood*. The last of the cases upon this subject is *Rex v. Norton Bavant (a)*. [*Patteson, J.* In that case the servant was to have a half holiday on Saturday. Here he is to have a whole one on pay-Saturday.]

Lord DENMAN, C. J.—There is a little ambiguity in the way in which this case is settled. The case states

(a) *Ante*, iv. 687.

that the workmen were hired from 5th April, 1816, to 5th April, 1817, to hew, work, fill, and drive coals, and to do such other work as should be necessary for the carrying on the said colliery, and as they should be required and directed to do by the owners, &c., at the respective prices, and on the following, amongst other terms and conditions therein contained — That, &c. That is not a satisfactory mode of setting out the contract. I think that, stated as it is, the proper construction of the contract is, that the pauper was to do such work as might be deemed necessary to the carrying on the colliery and he might be required to do, having reference to the terms and conditions, or according to the description thereafter contained. Then I see no reason to doubt that this is an exceptive hiring. There is an exception of Sunday and pay-Saturday, on both of which the workman was to be his own master.

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LITLEDALE, J.—I am of the same opinion. There is, at least, one day in the fortnight clearly excepted. On that short ground I think the determination of the sessions wrong.

PATTESON, J.—I also am of the same opinion, on the short ground that this is a contract to work eleven days in a fortnight.

WILLIAMS, J., concurred.

Order of Sessions quashed.



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A corn rent given by an act for inclosing lands and extinguishing tithes to the rector in lieu of tithes, is ratable to the relief of the poor, unless there be an express clause of exemption.

Where therefore a commissioner appointed under such an act is directed to ascertain the yearly value of all the tithes, moduses &c., and in making such valuation, the tithes of all lands are "to be deemed equal in value to one-fifth part of the annual *net* value of such lands," and a corn rent equal to the value of the tithes is to be settled and charged in due proportions upon the lands, and to be payable to the rector by the occupiers of the lands,—the rector is liable to be rated in respect of such corn rent.

UPON appeal by the Rev. *George Mingaye*, clerk, rector of the parish of Wistow, Huntingdonshire, against a rate made for the relief of the poor of that parish, on 16th October, 1834, the sessions quashed the rate, subject to the opinion of this Court upon the following case:

Previously to the year 1830, the rector of the parish of Wistow was entitled, in right of his rectory, to the tithes of corn, grain, hay, and all other great and small tithes arising within that parish, but on 3d May, 1830, an act of parliament was passed for inclosing the said parish, and for extinguishing the tithes in the said parish, which act is to be considered as forming part of this case.

By sect. 25 of that act, it was enacted as follows:

"The said commissioner of inclosure shall, and he is hereby required to ascertain and distinguish the yearly value of all the tithes, and of all moduses, compositions, and other payments, if any, in lieu of tithes, arising out of and from any of the lands in the parish of Wistow, hereby directed to be divided, allotted, and inclosed, and out of and from all gardens, orchards, and other ancient and inclosed lands and grounds in the said parish, and due and payable to the rector; and in making such valuation, the tithes of all such lands hereby directed to be divided &c., and of all the ancient and inclosed lands (except the inclosed fen lands) as shall be arable, shall be deemed equal in value to one-fifth part of the annual *net* value of the said lands, and the tithes of all such inclosed fen lands shall be deemed equal in value to one-seventh part of the annual net value of such inclosed fen lands; and the tithes of all other lands in the said parish shall be deemed equal in value to one-eighth part of the

annual net value of all such other lands, after deducting the lands set out for roads, and the allotments hereinbefore directed to be set out for the purposes of getting stone, chalk, gravel, and other materials; and the commissioner shall, and he is hereby required, in the next place, to ascertain the average price of a bushel of good marketable wheat, in the county of Huntingdon, for seven years next before the passing of this act, and shall in and by his award, or by some previous writing under his hand, and to be annexed thereto, ascertain and distinctly set forth how many bushels of such wheat will in his judgment be equal to the annual value of the said tithes; and after such valuation and ascertainment, the commissioner shall, and he is hereby required, to determine what sum of money shall be equal to the value of the quantity of wheat so ascertained by him, and such sum of money shall be charged and apportioned by the commissioner, upon such lands and tenements of each and every proprietor, and in such manner as he shall think equitable; and such sum of money, when so apportioned and charged, shall be issuing out of the lands &c. which shall be charged therewith by the commissioner, and shall be paid and payable by the person or persons who for the time being shall be in the occupation of such lands &c., to the said rector and his successors for ever, unless altered by the means hereinafter provided, by four equal quarterly payments, (that is to say,) on &c., the first payment whereof shall be made on 25th March next after the execution of the award, or such earlier quarterly day of payment as the commissioner shall by such award or previous writing as aforesaid, direct or appoint; and the said rent hereinbefore made payable, shall be and is hereby declared to be in lieu and full satisfaction and discharge of all and all manner of tithes, both great and small, moduses, compositions, and

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other payments in lieu of tithes, arising, growing, issuing out of and payable in respect of all lands, tenements, and hereditaments whatsoever, in the parish of Wistow, (except Easter offerings, surplice fees, and mortuaries.) And from and after the apportionment of the said rent as hereinbefore provided, or at such other time as the commissioner by any writing under his hand shall fix and appoint, all and all manner of tithes, and all former moduses &c., within the said parish, shall cease, determine, and be for ever extinguished; but in the meantime the said rector and his successors respectively, shall be entitled to such tithes as he or they would have been entitled to if this act had not been passed."

The commissioner, by writing under his hand and seal, bearing date 3d October, 1832, ascertained and set forth the quantity of wheat, in his judgment, equal to the annual value of the said tithes, and determined the sum of money equal to the quantity of such wheat, and thereby charged and apportioned such sum of money upon the lands and tenements of each and every proprietor in the proportions set forth in the schedule to such writing. And the said commissioner by such writing directed and appointed the first quarterly payment of such rent or sums of money, to be made on 25th December then next, and fixed and appointed that all and all manner of tithes, and all former moduses &c., within the said parish, had ceased, determined, and were for ever extinguished, as and from the 29th of September then last past.

The commissioner's general award was signed on the 17th of January, 1833, the previous writing of 3d October, 1832, being annexed thereto; and they are now both inrolled with the clerk of the peace for the county of Huntingdon, pursuant to the directions of the act.

The rector of the parish, (the present appellant,) has

ever since been, and is now, in receipt of the amount of the said corn rent, in lieu of his former tithes, and in October, 1834, was rated to the poor in respect of such corn rent.

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The question is, whether the rector is liable to be rated in respect of such corn rent.

*Campbell, A. G. and Gunning*, in support of the order of sessions. The whole question in this case turns upon the effect of the use of the expression "annual net value." [*Patteson, J.* There is no clause of exemption in the act.] There is not, and it must be admitted that if the "net" did not occur in the act, the corn rent in question would, according to the decisions in *Lowndes v. Horne (a)*, and *Rex v. Boldero (b)*, have been liable to poor-rates. If in ascertaining the value of the land the commissioner was bound to deduct all charges, amongst others the poor-rates, then it is submitted that the corn rent ascertained accordingly, is not liable to be rated to the relief of the poor, for were it otherwise, the rector would in effect be twice rated in respect of his dues. Suppose the gross annual value of a certain parcel of arable land to be 100*l.*, and the poor-rate to be 50*l.*, then if the commissioner took 50*l.* as being the annual net value of the land, he would fix the corn rent at 10*l.* If the corn rent was itself to be liable to the rates, the amount ultimately received by the rector would only be 5*l.*, that is, one-tenth of the annual net value, and only one-twentieth of the gross annual value of the land. In this case the commissioner did undoubtedly deduct the amount of the poor-rates from the value of the land in the first instance, in order to obtain the annual net value of the land; and if he was wrong in doing so, the con-

(a) 2 W. Bla. 1252.

Barn. & Cressw. 467; 3 Dowl.

(b) 6 Dowl. & Ryl. 557; 4

& Ryl. Mag. Ca. 281.

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sequence of a double rating follows. [*Patteson*, J. It strikes me, in reading this clause, that it may have been supposed that the *gross* produce of the *tithes* was equal to one-fifth of the *net* annual value of the *land*, and that may be intended to have been adopted as a convenient mode of calculation.] If the word "net" was meant to signify "free from all rates" &c., then it is submitted that the corn rent is not ratable. If it have not such meaning, then cadet questio. In *Chatfield v. Ruston* (a), commissioners were to ascertain what yearly sum the tithes were worth, and there was to be issuing and payable to the vicar, out of the lands, such yearly sum, "free and clear of all rates, taxes, and deductions whatsoever;" and it was held that these words exempted the vicar from poor-rate in respect of the yearly sum so ascertained and payable. And in *Mitchell v. Fordham* (b), a corn rent, "free from all taxes and deductions whatsoever, except land tax," made payable out of the lands, in lieu of tithes, was held not ratable to the poor. [*Patteson*, J. It is the annual net value of the *land* that is spoken of in this statute.] That fact is relied upon to distinguish this case from *Rex v. Lacy* (c), which will no doubt be cited contra. In that case, the commissioners for inclosing lands in the parish of Whiston, were to ascertain the *net value* of the great *tithes* and moduses of the lands to be inclosed, and affix a clear annual rent or sum of money per acre, in lieu of such tithes and as an adequate compensation for the same, to the rector; and in lieu of the small tithes, the rector was to have an allotment of land. It was held that the rector was liable, in respect of the rent, to be rated to the repair of the highways.

(a) 5 Dowl. & Ryl. 675; 3 B. & C. 863; 3 Dowl. & Ryl. Mag. Ca. 107.

(b) 9 Dowl. & Ryl. 335; 6 B. & C. 274; 4 Dowl. & Ryl.

Mag. Ca. 356.

(c) 8 Dowl. & Ryl. 457; 5 Barn & Cressw. 702; 4 Dowl. & Ryl. Mag. Ca. 101.

The ground of this decision appears from the following passage in the judgment of the Court, delivered by *Bayley, J.*:—"The question is, what is here meant by the net value of the great tithes and moduses. If by *net* is meant, not only allowing for the expenses of *collecting and getting in*, but deducting also all *parochial burthens* thereon, the rents are exempt; but if the word *net* refers only to the expenses of collecting and getting in, the act leaves them liable to the parochial burthens they would otherwise have to bear; and it seems to us it refers to the expenses of collecting and getting in only. Those expenses may easily be computed: they will seldom vary, except as the price of labour and the accidents of each season vary; but the parochial burthens may vary in a much greater degree; and had it been intended to exempt the rector from contributing to them, in respect of the corn rent, it can hardly be supposed that he would have been left liable in respect of his allotments. The probability is, he would have been wholly exempted or wholly liable." The difficulty arising from the use of the word *net*, as applied to the *lands*, cannot be solved in the same way, because there are not, as in the case of tithes, any such outgoings as the expenses of "collecting and getting in." The duty of the commissioner in this case, is to make the same calculation that a man who proposed to buy an estate would make. He would inquire what has been the average amount of the gross produce of the land, for the last seven years probably, and then would ascertain the average amount of the poor-rates, and other charges, during the same period. Then he would obtain the *net value of the land*, so as to enable him to regulate the amount of the purchase-money. In *Rex v. Lower Mytton (a)*, a canal company was held ratable according to the annual profit which the

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(a) 4 Mann. & Ry. 711; 9 Barn. & Cressw. 810; 2 Man. & Ry. Mag. Ca. 424.

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subject of their occupation within each parish produced, and such *annual profit* was held to be the rent which a tenant would give, he paying the poor-rates and the expenses of repairs, and the other annual expenses necessary for making the subject of occupation productive. So in *Rex v. Hull Dock Company (a)*, the company were rated at the full value of their works, without deducting the poor-rates, under an act which made property within Kingston-upon-Hull ratable according to its "worth or value;" and it was held that the rates ought to have been deducted. *Rex v. Boldero (b)* was decided upon a statute in which the same words are used as in the act upon which the present question arises, with the exception of the word "net," which, as this act was passed a few years after the decision of *Rex v. Boldero*, may reasonably be supposed to have been introduced with a view to withdraw the corn rents in question from the operation of that decision. [*Patteson, J.* If that were so, it is a pity the legislature stopped where they did. Their intention might have been made much clearer.] Certainly, it might have been made so clear, that no question could have been raised upon the act; but it is submitted that in point of law the matter is clear. In *Rex v. Boldero*, *Littledale, J.* observes, that the *ability* of the rector was not diminished by the extinguishment of the tithes. Here it would be so, if the rent be liable to the poor-rates, because they would in fact be twice rated; and therefore the observation of *Littledale, J.* makes *Rex v. Boldero* in some measure an authority in favour of the rector.

Sir *W. W. Follett*, (with whom were *Pryme* and *Tom-*

(a) 5 Dowl. & Ryl. 359; 3  
 Barn. & Cressw. 516; 2 Dowl.  
 & Ryl. Mag. Ca. 464.

(b) 6 Dowl. & Ryl. 557; 4  
 Barn. & Cressw. 467; 3 Dowl.  
 & Ryl. Mag. Ca. 281.

*linson*), having referred to *Rex v. Lacy* and *Rex v. Boldero*, observed, that though the word *net* should be taken to mean "clear of all rates &c.," still it did not follow that the corn rent was to be free from poor-rates, for that the legislature might have considered the tithes equal to the stated proportions of the value of the land, after deducting the rates, &c.

(He was stopped by the Court.)

LORD DENMAN, C. J.—It appears to me that the argument of Sir *Wm. Follett* may be well founded, and that although "net" may mean clear of all rates and taxes, yet the corn rent may nevertheless be ratable. I do not know that the legislature would have given one-fifth of the gross value of the arable land: That is a matter open to argument. I think it better to decide on the more general ground adopted by the Court in *Rex v. Boldero*, that unless there be an express exemption of the rents, they are liable to the ordinary parochial burthens. This ground of decision furnishes a rule which prevents all doubt; and in adopting it, I think we are fully borne out by the authorities.

LITTLEDALE, J.—In general the rector is entitled to one-tenth of the gross produce of the land, and may go with carts and take it in kind. If he does so, he is liable to pay tithes. Instead of one-tenth of the gross produce of the land, this act gives the rector one-fifth of the annual net value of the arable land, and other proportions of the net annual value of other lands. The annual net value is the value to the owner, after deducting the poor-rates, sewers-rates, and we will say the land-tax, and the expenses of manurance and cultivation, and of converting the produce into money. It is wrong to say

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that the rector would be twice rated. In point of fact, when the calculation is made of the amount at which lands should be rated, the amount of the tithes is deducted, and tithe-free lands are rated higher than lands which are subject to tithes.

PATTESON, J.—In *Rex v. Boldero*, the Court said decidedly, that unless there is an actual exemption in the act of parliament, corn rents given in lieu of tithes are ratable to the relief of the poor. This is a broad ground of decision, and it is desirable to adhere to it. There must be some clause of exemption. Then it is said that in this case there is a clause of exemption,—that the word “net” has that effect, because it makes it necessary, in ascertaining the value of the land, to deduct the amount of poor-rates. The word *net* is omitted when speaking of the annual value of the tithes, and is only used in speaking of the land. The whole question turns upon the use of this word, for it is conceded that but for that word the corn rent would be ratable. What is meant by the act is, that one-fifth of the *net* annual value of the *land*, shall be deemed equal to the *gross* annual value of the *tithes*. Upon the whole, it appears to me that the money paid in lieu of tithes is ratable.

WILLIAMS, J.—The whole question arises from the *certain*—or it may be called, the *arbitrary*—mode given for ascertaining the value of the tithes. Instead of inquiring directly as to the value of the tithes, the commissioners are to ascertain the net annual value of the land, and one-fifth of that value is to be deemed the value of the tithes. We cannot inquire whether or not the given proportion is sufficient. The word relied on only affects the quantity that the rector is to have in lieu of his tithes,

and does not affect his liability to be rated. A compensation given in lieu of tithes must follow the fate of the tithes themselves, in this respect, unless expressly exempted.

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—◆—  
 REX v. The Inhabitants of SOURTON.

UPON appeal, an order for the removal of *Ann T. Soper*, spinster, from Lamerton to Sourton, in Devonshire, was confirmed, subject to the following case:—

The respondents proved the birth of the pauper, twenty-five years ago, in Sourton. The appellants called *John Tickle*, who proved that he had been married to the pauper's mother, in Sourton, seven years before the pauper was born,—which was further proved from the marriage-register. He then proved that he had since gained a settlement by renting a tenement, which he had occupied about twenty-five years, at Clifton.

The respondents relied on proving the non-access of *John Tickle* to his wife, and thereby the illegitimacy of the pauper. They called one *Soper*, and partly from his evidence and partly from the cross-examination of *John Tickle*, the sessions found the following facts:—That the mother's general residence, for a year previous to the birth of the pauper, was in Sourton; that the pauper went by the name of *Ann Tickle*, though called *Ann Tickle Soper* in the order of removal; that *John Tickle* had removed from Sourton to Clifton (one hundred miles distant) about five years before the pauper's birth, and that his general residence from that period to the present time had been at the latter place. It further appeared from the cross-examination of *John Tickle*, that during

Upon the trial of a question as to the legitimacy of a child procreated during the marriage of *A.* and *B.*, neither *A.* nor *B.* is a competent witness to prove the non-access of *A.*

Nor can their evidence of facts, from which non-access may be inferred, be received for that purpose.

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his residence at Clifton he had been living in incestuous intercourse with his wife's sister, who had borne him children.

The sessions were satisfied with the proof of non-access, if they were right in admitting the evidence of *John Tickle*, without which they had not sufficient grounds to find the fact of non-access. If that evidence was inadmissible, the order was to be quashed; if it was admissible, the order was to be confirmed.

*Praed*, in support of the order of sessions. The question intended to be raised is, whether *John Tickle* was legally competent to give any evidence with a view to the proof of the fact of non-access. He was called by the appellants to prove his marriage with the pauper's mother previously to the birth of the pauper, and that he had gained a settlement in Clifton by renting a tenement. He was cross-examined as to his place of residence, and he stated that for five years before the birth of the pauper he had lived apart from his wife, and was resident a hundred miles distant from her. The objection to *John Tickle's* evidence was, that a *parent* cannot bastardise his own children. The rule, which is said to be founded in decency, morality and policy, is, that parties shall not be permitted to say, after marriage, that they have had no connection: *Goodright v. Moss* (a). But it is submitted that the rule does not apply to a mere statement of facts, tending to shew that within a certain time no intercourse has taken place, but only to direct evidence of the fact itself; and that, moreover, it will be found upon the authorities to be applied to the mother only. It is difficult to see how evidence, such as that given by *Tickle* upon his cross-examination, can be said to be inadmissible. Is it entirely inadmissible, or is it merely not to be taken for

(a) Cowp. 591.

this one purpose? It was laid down in *Rex v. Cliviger* (a), that husband and wife cannot be permitted to give any evidence that may even *tend* to criminate each other; but this rule was said, in *Rex v. The Inhabitants of All Saints, in Worcester* (b), to have been laid down in terms much too general, and recent decisions have established that the husband and wife may give evidence which may criminate or contradict each other, provided the consequence be not *immediate*. In *Rex v. Inhabitants of Bathwick* (c) the rule was confined to cases where the husband or wife is directly interested. This inquiry, so far as respects *John Tickle*, was *res inter alios acta*. It was a question between two parishes,—which of them was liable to maintain the pauper and his family. [Lord Denman, C. J. This case does not set out the evidence, and it is difficult to see what evidence *John Tickle* gave.] Upon a question whether a child is legitimate or not, both parents are competent witnesses as to some facts by which the child would be shewn to be illegitimate. Thus, it appears from *Rex v. Bramley* (d), *Rex v. St. Peter's, Worcestershire* (e), and *Standon v. Standon* (f), that the (reputed) husband and wife are competent to disprove the *marriage*. The last case was *Standon v. Edwards* (g), which came before Lord *Thurlow*, and there his lordship said, “Certainly a father coming to bastardize his own issue, *though a legal witness*, comes forward under a cloud of suspicions.” [Lord Denman, C. J. The question in those cases was, as to the *validity of the marriage*. Here the marriage is not disputed.] If parents can disprove the marriage, which must necessarily bastardize their children, there is

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(a) 2 T. R. 263.

(b) 6 Maule &amp; Selw. 194.

(c) 2 Barn. &amp; Adol. 639.

(d) 6 T. R. 330.

(e) Bull. N. P. 112; S. C. Burr.

S. C. 25.

(f) Peake, N. P. C. 45.

(g) 1 Ves. jun. 133.

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no reason why they should not be allowed to prove other facts involving that consequence. The rule of policy laid down in *Goodright v. Moss*, will be found, upon an examination of the cases, to be, that the *wife* alone is incompetent to prove the non-access of the husband, and the testimony of the wife even has been received in some cases along with that of other witnesses, to prove facts which tended to shew non-access. [Lord *Denman*, C.J. The decisions never rested upon that distinction.] In *Rex v. Bedel* (a) the wife proved in terms that the husband had no access to her; and she also proved some other facts as to the marriage. It was held that although the wife was not admissible as a witness to prove non-access, yet she was a competent witness to a certain extent. In *Rex v. Reading* (b) the *wife* proved that within a certain time her husband had no access to her, and other witnesses proved the husband to be within seven miles of her at that time. The Court held that although the wife ought not to be permitted to prove the want of access, which might be notorious to the whole neighbourhood, yet she might prove incontinence on her part. [*Patteson*, J. For the purpose of fixing a particular man as the father of a child, it might be *necessary* to permit the wife to prove the fact of criminal intercourse. But it is not in the same manner necessary that the husband should be admitted to prove that he was living at a distant place.] In *Pendril v. Pendril* (c), upon a question of access or non-access, Lord *Raymond* would not suffer the *wife's* declaration, that she should not know her husband by sight, till after she had been produced on the other side, and denied the declaration upon cross-examination,—the fact of the

(a) Cases Temp. Hardw. 379; Temp. Hardw. 79.

2 Stra. 941 and 1076.

(c) Bull. N. P. 113 a; 2 Stra.

(b) Bull. N. P. 113; Cases 925.

marriage not being disputed, but only the legitimacy of the issue. In *Rex v. Kea* (a) it was held that the mother could not prove the non-access of the husband, because it would be contrary to decency and morality. *John Tickle* was in fact called to prove the legitimacy of the pauper. Assume that he had proved not only his marriage, but constant access—and for that purpose he is clearly admissible,—might he not have been *cross-examined* as to those facts? [Lord *Denman*, C.J. Are you not assuming too much when you suppose he was called to prove the legitimacy of the pauper? Was he called to prove more than that he had been married to the pauper's mother?] Is he not to be cross-examined as to that fact? Certainly he may: yet his answer might have the effect of shewing the child a bastard,—as if the marriage was defective. The statement by *John Tickle*, that he had been living at Clifton for the last thirty years, does not of necessity prove non-access to his wife. But surely the Court of Quarter Sessions were at liberty to draw that inference from that fact and the other circumstances of the case. It must be recollected that *John Tickle's* evidence was material to prove his subsequent settlement in Clifton, but it cannot be disputed that his cross-examination was with the express object of proving non-access. [Lord *Denman*, C. J. If the object really is to make out by his evidence the fact of non-access, does not the common rule of law apply?] In *Goodright v. Moss* Lord *Mansfield* says, as to the first question (whether the father and mother could have been examined upon the question whether a child was born before or after marriage), “I should as soon have expected to hear it disputed whether the attesting witnesses to a bond could be admitted to prove the bond.

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(a) 11 East, 132.

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I have known it done over and over again, and it is much too clear to admit of a doubt." [*Patteson*, J. It does not seem to be disputed that the parents may bastardize their issue by giving evidence of *any other fact* besides non-access.] Suppose a case where the father had been *abroad* for two or three years, would the mother be competent to prove the time of birth? She would. Yet the effect would be to bastardize the issue by raising the inference of non-access. What is the foundation of the rule? That it would be contrary to decency and morality if the parents were to say that there had not been access. It cannot, however, be said, that to permit *John Tickle* to give this evidence would be contrary to decency and morality. The observations of Lord *Ellenborough*, in *Rex v. Luffe(a)*, are conformable to the position of law which is now contended for.

*Crowder*, *contra*, was stopped by the Court.

LORD DENMAN, C. J.—We do not think it necessary that we should hear the other side. Indeed it is desirable that we should not do any thing which may imply *any doubt whatever* as to the rule. The rule is, that *neither the mother nor her husband* is competent to prove non-access. It is to be taken as an indisputable rule of law, that for the purpose of proving non-access neither the husband nor the wife can be admitted. Although the precise questions and answers put to and given by *John Tickle* are not stated in the case, yet it is impossible not to draw the conclusion from what is stated, that this person, who was called on the part of the appellants, was cross-examined for the purpose of making out circumstances from which it was intended to raise the inference of the fact of non-access. When

(a) 8 East, 193.

the husband was questioned as to his course of life, with the avowed purpose of proving non-access to his wife, the rule of law immediately applied. The sessions were satisfied of the fact of non-access, provided they were right in admitting the evidence of *John Tickle*, but without it they had not sufficient ground for finding that fact. It is quite evident that the sessions have admitted the husband to prove facts which, by the clear and obvious rule of law, he was incompetent to prove.

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LITLEDALE, J.—The sessions have stated that they were satisfied with the proof of non-access *if* they were right in admitting the evidence of *Tickle*, without which they had not sufficient grounds to find the fact of non-access; and the question is, whether they were right in admitting that evidence. I entirely concur in the rule laid down by Mr. *Starkie* (a), Upon that it might be a question whether the rule went further than this,—that the husband or wife cannot be asked as to the direct fact of non-access; but it appears to me to go a great deal farther, and that the rule ought to be extended to all questions whatever which have a tendency to prove the fact of access or non-access. Suppose an issue as to legitimacy to be sent to be tried upon a question whether the husband had access to the wife

(a) The rule is thus laid down by Mr. *Starkie* in the 1st edition of his *Treatise on Evidence*, vol. ii. p. 223, "It has been said that the *mother*, being a married woman, is not competent to prove the non-access of the husband, as it seems, upon a principle of public policy, which prohibits the wife from being examined against her husband in any matter which affects his interest or

character, unless in cases of necessity." He, however, adds this note,—“In the case of *Goodright v. Moss*, Cowp. 591, Lord *Mansfield* says, ‘It is a rule, founded in decency, morality and policy, that *the parties* shall not be permitted, after marriage, to say that they had *no connexion*.’”

The same passage occurs without alteration in the 2nd edition of the work, vol. ii. p. 139.

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from such a time to such a time. In that case neither husband nor wife could be admitted to prove the negative. Their evidence ought to be rejected altogether. Now, in the present case the whole object of the cross-examination of *John Tickle* was to prove the fact of non-access by him to his wife. It is admitted that the questions were asked with that object, and though he might have proved the facts stated by him for any other purpose, yet, in as far as his evidence went to prove non-access, it ought not to have been allowed. His evidence ought to be regarded as if it had never been given at all. It was as much inadmissible as if he had been asked as to the direct fact of non-access.

PATTESON, J.—It is very much to be regretted that the sessions have stated this case in the manner in which they have done it. I have very great difficulty in finding what the sessions received and what they rejected; but according to my apprehension it seems that they mean to submit the question, whether the evidence of *John Tickle*, as far as it related to the fact of non-access, was admissible. There is no doubt that as *John Tickle* was called by the appellants, he was admissible for some purposes. No doubt he was competent to prove many of the facts, as the birth, the settlement acquired by himself in Clifton, the residence there; but the respondents went on to cross-examine him, in order to shew that there was not access. It seems to be admitted that *John Tickle* could not legally be asked as to the *direct* fact of non-access. It is quite trifling to say that you are not to put the question directly, but may put any question leading up to it. Upon the issue of access or non-access, whether arising at the sessions or upon the trial of an issue out of Chancery, I am of opinion that neither the husband nor the wife can be examined at all.

WILLIAMS, J.—I was rather disposed to send the case back, that the evidence of *John Tickle* might be set out; but I shall assume, with the rest of the Court, that he was examined with a view to establish the fact of non-access, and that without his testimony the sessions would not have found the fact. Beyond all question, *Tickle* was incompetent to give testimony on the issue of access or non-access; and as the finding of the sessions proceeded upon evidence given by him as to that fact, the order of sessions cannot be supported.

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UPON appeal, an order for the removal of *Elizabeth Hanson*, widow of *William Hanson*, and her children, from the parish of Aslackby to the parish of Pointon, both in the parts of Kesteven, in the county of Lincoln, was quashed, subject to the following case:—

In 1825 *William Hanson*, who had acquired a settlement in Pointon, agreed to purchase land in Aslackby for 670*l.*, which land was conveyed to him in fee in 1828, and was immediately mortgaged to Mr. *B. Smith* for 450*l.* (a). In May, 1830, *W. Hanson* died seised of

Under a devise of land in Dale to trustees, upon trust to sell and pay debts and legacies, and to pay the residue, if any, to A.,—A. has an equitable estate in Dale, from which he is irremovable, and in respect of which, by forty days' residence in the parish, he gains a settlement in Dale, whether the residuary interest be or be not of any value.

(a) It does not appear whether the mortgage was in fee or for a term. But it is stated that *W. Hanson* died seised of the land, and in the course of the argument it appears to have been considered that the legal estate

was in the devisees. If it was so, the mortgage must have been for years. It is conceived, however, that the result must have been the same if *W. Hanson* had died seised of an equity of redemption only, in which case

Any inquiry therefore into the state of the accounts and the solvency of the estate, is irrelevant to the question as to A.'s settlement in Dale.

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the land, the said mortgage debt, with a considerable arrear of interest, being still a charge thereon.

By will, dated 24th May, 1830, and legally executed for passing real estates, *William Hanson* devised all his real and personal estate to *Caswell* and *Wilkinson*, in trust to sell and to apply the proceeds in payment of his debts, due on mortgage or specialty or simple contract, and the interest of debts carrying interest, and also his funeral expenses, and to pay the residue to his wife (the pauper) for her own use and benefit; to which words he added, "and I give and bequeath the same moneys and premises accordingly." And he appointed *Caswell* and *Wilkinson* his executors.

*W. Hanson* died soon after the date of his will, which was duly proved by the executors.

After *W. Hanson's* death, his devisees and executors possessed themselves of all his personal estate, consisting of household goods and furniture, cows, horses, waggons, and stock in trade. They have occupied all his real estate, but have rendered no account to his widow, who, with her children, has resided for the last three years with her father in Aslackby. Upwards of a year after her husband's death, and whilst the pauper was so resident in Aslackby, *Caswell*, on her application for assistance, paid to her 30s. by two payments, on account.

*Caswell* and *Wilkinson* would, by the devise, take no estate or interest, but merely an office or duty, to be discharged in respect of the land,—in substance, an authority exerciseable over the equitable estate of the widow. As ancillary to the discharge of this office or duty, *Caswell* and *Wilkinson* would, however, be

entitled to call upon the mortgagee for a conveyance of the legal estate, so far as such conveyance was necessary to enable them to comply with the requisitions of the will. And see *Hayes's Introduction to Conveyancing*, 2nd edit. 309(86); *Hayes's Concise Conveyancer*, &c.

The respondents called the attorney for the executors and devisees, who proved that the estate had been put up for sale, but that no offer had been made for it, and that a large arrear of interest had become due since the decease of *W. Hanson*, and that the executors and devisees would be glad to sell the estate for the amount of principal and interest. The respondents then called *Caswell*, who was interrogated as to the solvency of *W. Hanson's* real and personal estate; but the appellants objected to the inquiry on the ground that the Court of Quarter Sessions was not the proper tribunal for such an investigation, and that as the pauper, who was alone interested in the matter, never had been apprized of the state of her husband's affairs, or furnished with the particulars or any account thereof, the Court could not enter upon the subject either of accounts or of the present value of the estate remaining unsold and in the occupation of the executors and devisees, as these were matters to be adjusted either by the parties themselves or by the Court of Chancery. The sessions sustained this objection, and quashed the order, subject to the opinion of this Court upon the admissibility of the evidence, and upon the question whether the pauper took under the will a sufficient estate to confer a settlement, in the absence of any adjustment of her husband's affairs.

*Amos*, in support of the order of sessions. The devise of the residue of the real, together with the personal estate, after payment of debts, gave to the devisee an equitable estate in the land sufficient to confer a settlement. In *Roper v. Ratcliffe* <sup>(a)</sup> lands had been conveyed by *John Roper* to trustees and their heirs, in trust to sell the same, and out of the money to be raised by

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(a) 9 Mod. 167.

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such sale, and out of the rents and profits, until sold, to pay a mortgage debt of 4000*l.* and interest, and other debts mentioned in a schedule annexed to the conveyance, and to pay the surplus to such person as *John Roper* should, by writing under his hand attested, &c. or by will, appoint. Afterwards *John Roper*, by his will and codicils, bequeathed several pecuniary legacies, and devised and bequeathed the residue of his real and personal estate to *Ratcliffe* and *Constable*. *John Roper* having died, *Ratcliffe* and *Constable* filed a bill against one *Edward Roper*, to have the trust estate sold, and to have an account of the profits, and (after the debts and legacies were paid) to have the surplus money arising by sale equally divided between them. *Edward Roper*, by his answer, stated that he was heir at law to the testator, and a *Protestant*, and that *Ratcliffe* and *Constable* were then and at the time of the testator's death *Papists*, and as such were rendered incapable, by 11 & 12 *Will. 3*, c. 4, of purchasing any lands or profits out of lands. A case was stated, and argued before *Parker*, C. J., *Trevor*, C. J., and *Powell*, J., who, together with *Trevor*, M. R., concurred in opinion that the devise of the residue of the real and personal estate to *Ratcliffe* and *Constable*, after debts and legacies paid, was a good devise, notwithstanding the statute, for that the surplus money was a *personal interest* in them. Lord *Harcourt*, C., decreed accordingly in favour of the plaintiffs. *Edward Roper* having appealed to the House of Lords, it was argued for the respondents that a *devise* was not a *purchase* within the statute, and that this devise was no more than a *pecuniary* bequest, which *Papists* were capable of taking, notwithstanding the statute; for that it was a standing rule of equity, that lands devised for payment of debts and legacies are to be deemed as money, and that money devised to buy lands is deemed

as lands, and that it is so also of lands or money in the hands of trustees. But it was answered and resolved, that a *devise* to a Papist, who is a stranger to the inheritance, is within the meaning of the statute; and "That though lands devised for payment of debts and legacies are to be deemed as money so far as there are debts and specific legacies to be paid, yet still the heir has an *interest in such lands* by a resulting trust, so far as they are of value after the debts and legacies are paid; and the heir at law may properly come into a court of equity, and restrain the vendor from selling more of the lands than what are necessary to raise money sufficient to discharge the debts and legacies, and to compel the devisee to convey the residue to him, which residue shall not be deemed as money, neither shall it go to the executors of the testator. Nay, the heir in such case may properly come into a court of equity, and offer to pay all the debts and legacies, and pray a conveyance of the whole estate to him; for the devisee is only a trustee for the testator, to pay his debts or legacies. This is a privilege which has been always allowed in equity to a residuary legatee; for if he come into court, and tender what will be sufficient to discharge all the debts and legacies, or pray that so much of the lands and no more may be sold than what will raise money to discharge them, this is always decreed in his favour. Therefore, though lands given in trust, or devised for payment of debts and legacies, shall be deemed in equity as money in respect of the creditors and legatees, yet it is not so in respect to the *heir at law* or *residuary legatee*; for in those cases they shall be deemed in equity as *lands*." (a)

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(a) And see *S. C. Brown's tit. Papists, &c. (C) 7*, 5th and Cases in Parl. 1st ed. vol. i. 450, 6th ed. vol. v. 277, 281; 18 Vin. 2d ed. vol. v. 360; Bacon's Abr. Abr. 261.

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And in *Rex v. Wivelingham* (a) it was held that an estate being devised to trustees to be sold to pay debts, and to divide the surplus, if any, amongst A., B., and C.—A. has an equitable interest in the estate, and by residing upon it forty days, gains a settlement. Lord Mansfield there mentioned the case of *Roper v. Ratcliffe* “to shew that a devisee of the surplus arising from the sale of lands, after payment of debts and legacies, has an equitable interest in the lands themselves, it being in his option to pay the debts and legacies, and keep the land.” The question whether the estate was solvent, and whether therefore there could be any residue coming to the pauper, was immaterial; for even were the estate proved to be insolvent, this circumstance could not affect the nature of the clear equitable interest in the land which the pauper took under the devise. Besides, the question is not in its nature such as the sessions could properly entertain. In *Rex v. Edington* (b), a cottage, leased for ninety-nine years, determinable on lives, purchased by the pauper's wife before her marriage, was in the life-time of her first husband conveyed to a trustee, in trust that he should, by sale or mortgage, raise 10*l.* (for the benefit of the parish, by whom the family had before been relieved to that amount,) interest and charges, and after payment of the same, in trust to re-assign the premises. Upon the death of the first husband, the pauper married the widow. The parties always remained in possession. It did not appear whether the money was ever paid, or what was the value of the cottage. It was argued that the whole interest was, by reason of the conveyance, out of the wife, for that it was uncertain whether there would be any residue; that therefore the case fell directly within *Rex v. St. Mi-*

(a) 2 Dougl. 767; S.C. Caldec. (b) 1 East, 288.

*chael's, Bath* (a), in which Lord *Mansfield* said, "The pauper had only a *chance of a residue*, and had no right to continue a moment in possession." But this argument was answered by the judgment, in which it was said that the argument against the settlement was grounded solely upon the dictum of Lord *Mansfield* in *Rex v. St. Michael's, Bath*, and that in that case the principal ground of the *decision* was, the *fraud* of the pauper. Until actual sale, it cannot be known what is the value of the interest: there *may* be a surplus; and until the fact is ascertained by sale of the property, the devisee of the residue has an equitable interest sufficient to confer a settlement.

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*N. R. Clarke* and *Bourne*, *contra*. Later authorities than those in the time of Lord *Mansfield* have laid down that a mere equitable *interest* is not sufficient to confer a settlement, but that there must be a clear equitable *estate*. Here there is no equitable estate in the pauper. This is the case of an estate being devised in trust to sell and pay debts, and to pay over the residue of the proceeds of such sale to the pauper. In *Rex v. Geddington* (b) a written agreement was made for the purchase of an estate, to be paid for by two instalments; the first was to be payable within a few days after signing the agreement, and the last in seven months afterwards. The vendor was to make out a good title, and on the payment of the last instalment to convey the premises; but the purchaser was to be let into possession upon the payment of the first instalment. The purchaser paid the first instalment, and was let into possession, and continued in possession for a year and a half, but the last instalment was never paid, nor was any

(a) 2 Dougl. 630.

Barnw. & Cressw. 129; 2 Dowl.

(b) 3 Dowl. & Ryl. 403; 2

& Ryl. Mag. Ca. 101.

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conveyance ever executed ; and the purchaser afterwards gave up the contract upon receiving back part of the first instalment. It was contended that the equitable title was complete from the moment when possession was given under the contract, although it might be defeasible on non-payment of the residue of the purchase money, and that therefore the purchaser had a sufficient estate to confer a settlement. *Holroyd, J.*, in the course of the argument, said, " If you shew that the vendor and vendee stood merely in the relation of trustee and cestui que trust, then the latter would have an equitable estate, and would gain a settlement. But none of the cases cited shew that a court of equity would, under the circumstances of this case, consider the estate to belong to the vendee, as he failed to pay the residue of the purchase money." And *Bayley, J.*, after referring to *Rex v. Long Bennington(a)*, said, " Though an equitable estate is sufficient to confer a settlement, a questionable right to go into a court of equity is not." Accordingly, in that case it was held, that the purchaser did not acquire an equitable estate, so as to gain a settlement. Here the pauper might, upon payment of the amount of the debts, have gone into a court of equity ; but a court of equity would not have considered the estate to belong to her, unless she had paid all the debts or tendered the amount in court. [*Littledale, J.* Here the devise to *Caswell* and *Wilkinson* gave them no interest. This is very different from the case of purchasers. All the property beneficially belonged to the pauper, subject to the payment of her husband's debts. It is true that there was a mortgage with arrears of interest ; but there may have been sufficient personal estate to pay all.] She would not have a complete equitable estate, so as to be able to go into a court of equity, until she had paid all

(a) 6 Maule & Selw. 403.

the debts (a). [*Littledale, J.* She could not pay the debts. The devisees and executors were, in a manner, her agents for the payment of the debts. A court of equity would have ordered the personal estate to be appropriated to the payment of the debts; and if that had been sufficient, would have compelled the devisees and executors to convey to her. She might have tendered sufficient money to pay the debts.] As the matter stood, she could not come and say that she had a right to reside upon the estate. How can a party be said to be irremovable (which is the foundation of the settlement by estate), when he has no right to reside upon the estate? In all the cases cited contra, the parties actually did reside upon the premises in question. [*Patteson, J.* referred to *Rex v. Darlington* (b), and Mr. Amos referred to *Rex v. Houghton le Spring* (c), in which it was considered that a party residing for forty days in a parish in which he has a real estate, gained a settlement thereby, although the estate were in the occupation of a tenant.] In that case the estate was freehold. In all the cases cited to shew that an equitable interest is sufficient to confer a settlement, such interest was coupled with an actual occupation of and residence upon the property. Where a person possesses freehold property in a parish, he is irremovable, though not in the occupation of it, because he has a right to superintend it. This seems hardly to apply to the case of a mere equitable interest, where the legal estate is in the hands of another. *Rex v. Woolpit* (d) (as confirming *Rex v. Geddington*), *Rex*

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(a) She could not go into a court of equity to compel a conveyance whilst the prior trusts of the devise remained unperformed, but she could go into a court of equity as ultimate owner of the land, for the purpose of

enforcing a due execution of the trusts with reference to her subsequent interest.

(b) 5 Maule & Selw. 493.

(c) 1 East, 247.

(d) 4 Dowl. & Ryl. 456; 2 Dowl. & Ryl. Mag. Ca. 272.

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v. *Berkswell* (a), and *Rex v. Cregrina* (b), were also referred to in the course of this argument.

Had it been shewn that there was a surplus, the pauper might be considered as having a complete equitable interest; but not only was this not shewn, but evidence to shew that the estate was not solvent was tendered, but rejected by the sessions. The rejection of this evidence, it is submitted, was wrong.


LITLEDALE, J. (c)—It appears to me that the pauper had a sufficient estate to confer a settlement in Pointon. Her husband, being indebted by mortgage and otherwise to a considerable amount, devises in trust to sell and to apply the proceeds in payment of all his debts, and also of his funeral and testamentary expenses, and to pay the residue to his wife (the pauper) for her own use and benefit; to which words he added, that he gave and bequeathed the same moneys and premises accordingly. It appears that the estate is still in mortgage, and that the devisees and executors would be glad to sell the estate for the amount of principal and interest. But they have also the personal estate: it does not appear to what extent. *Non constat*, but it may be sufficient to pay off the amount due to the mortgagee, and also the other debts; in which case the pauper would be entitled to a conveyance of the estate. If she is so entitled, she has an equitable estate. Then it is said that the pauper did not reside upon the estate. She did not; but she resided in the parish. The devisees held, but they did not hold adversely. It appears to me to be the same thing as if she had resided upon the estate her-

(a) 3 Dowl. & Ryl. 9; 1  
 Barnw. & Cressw. 542; 1 Dowl.  
 & Ryl. Mag. Ca. 467.

(b) *Ante*, 32; 2 Ad. & El. 536.  
 (c) Lord Denman, C. J., was  
 absent.

self. It is said that the widow would have no right to go into a court of equity until the debts were paid (a). That is very true; but she has, nevertheless, an equitable estate. The cases cited by Mr. *Clarke* are cases of *purchasers*, which are very different. The only case that seems to bear upon the point is *Rex v. Berkswell*. There, a lease for thirty years, of a cottage, had been granted to *Hands*, who resided in it above a year, and died, leaving a widow and three daughters. Administration was granted to the widow, but no distribution of the estate was made. The widow, and, by her permission, one of the daughters, with her husband, afterwards resided in the cottage for some years. It was held that the daughter, or her husband in her right, had not any equitable estate in the cottage, and that no settlement was gained by their residence in it. *Abbott, C. J.*, says, "I am clearly of opinion that the pauper (the daughter's husband) had not any such interest as would have enabled him to say, 'I will come and reside on this property.' If the widow of *Hands* had refused to let him do so, a court of equity would not have assisted him. The next of kin had not even an equitable interest, but had a mere right to an account, and perhaps upon that it might have turned out that the widow had paid debts to a greater amount than the value of the leasehold property in question." Here the residue, after payment of debts, is all devised to the pauper. She might have filed a bill to compel the devisees and executors to pay the debts, and, if there was sufficient without selling the estate, might have demanded a conveyance of it to her. Until sale, I think she certainly had an equitable estate.

The sessions were an incompetent tribunal to try whe-

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(a) *Vide ante*, 707, (a).

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ther a man's estate is solvent or not. Besides, it is quite immaterial. The widow might have had money of her own sufficient to pay off the debts.


PATTESON, J.—The husband, being mortgagor in possession, devises in trust for sale, and to apply the proceeds to pay off the mortgage and other debts,—the residue to his wife for her own use and benefit; and the question is, whether she took any equitable estate. It is immaterial what the *value* of the equitable estate may be. This is not a case under 9 *Geo.* 1, c. 7, s. 5, of a purchase,—but of an estate coming to the pauper by operation of law. *Roper v. Ratcliffe* (a) and *Rex v. Natland* (b), are precisely in point. The question is, not whether the pauper had any *beneficial* interest, but whether she had any *equitable estate*. The situation of the pauper in this case comes most precisely within the decision in *Roper v. Ratcliffe*, as stated by Lord Mansfield in *Rex v. Wivelingham*: and *Rex v. Natland*, which is quoted by Gould, J., in the same case, is also much the same. The pauper did not reside upon the premises, and it is argued that she had no right to reside. I do not know whether, under this will, she would have the right to reside or not. That might be a question. The devisees and executors, however, in fact resided as trustees. This is, I think, a clear case of trustee and cestui que trust. *Rex v. Geddington* is a case of a purchaser, and depending upon the act of 9 *Geo.* 1; and *Holroyd, J.*, there says, “If you shew that the vendor and vendee stood merely in the relation of trustee and cestui que trust, then the latter would have an equitable estate and gain a settlement.” This comes exactly within that position. In that case it was held, that no

(a) 9 Mod. 167.

(b) Burr. S. C. 793.

settlement was gained, because the parties did *not* stand in the relation of trustee and cestui que trust.

The only remaining question is, whether the position of the pauper could be altered by going into the question of assets. I think that quite immaterial. The question is merely whether any equitable estate passed. In *Rex v. Darlington* (a), which is a different case, I would just mention that no question was raised but that if there had been a clear devise of the surplus, the pauper would have gained a settlement; but it was held that, looking at the will, it was clear that the pauper was only one of several persons to whom the trustees might, at their discretion, have given the rents, if there had been any to dispose of.

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WILLIAMS, J.—It is too late to raise the question whether a person, having an equitable estate, can gain a settlement in respect of such estate. That has long been entirely settled. The only question is, whether *this* was an equitable estate. The argument against the settlement is based upon the assumption, that if the estate had been sold the pauper would have got nothing. But that is immaterial. The question is, what is the *nature* of the interest which she takes under this will. The devisees are trustees for the pauper, who is the person equitably entitled. That in a great degree disposes of the other question. Letting alone the question whether the Court of Quarter Sessions is a *proper tribunal* for an inquiry of the nature proposed,—I think it was immaterial, because any inquiry of that sort could not change the nature of the interest.

It is not necessary to reside actually on the estate. It

(a) 5 Maule & Selw. 493.

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is sufficient if the party have an equitable estate in the parish in which he resides. The possession of the devisees in this case was not adverse, but as trustees for the pauper.

Order of Sessions confirmed.

The KING v. The Vestrymen and Vestry Clerk of the Parish of ST. MARY-LE-BONE, in the County of Middlesex.

The Court cannot compel the officers of a parish to permit the rate-payers of the parish to take copies of or extracts from a book containing all parochial rates and accounts of all moneys received for parochial purposes, but not containing any account of parochial disbursements, kept under the directions of a local act.

So although the parish have adopted the provisions of 2 Will. 4, c. 60, (the Vestry Act.)

SIR W. W. Follett, in Michaelmas term last, obtained a rule, calling upon the defendants to shew cause why a mandamus should not issue, commanding them to permit and suffer *Charles Hibble*, and all and every person and persons rated to the relief of the poor of the parish of St. Mary-le-Bone, and all other persons mentioned or referred to for that purpose by the statute, made 2 Will. 4, (c. 60,) for the better regulation of vestries, and for the appointment of auditors of accounts in certain parishes of England and Wales, to inspect and take copies of or extracts from the rate-books of the said parish, and all other books mentioned or referred to and declared to be at all seasonable times open to such persons, by the said act, and why the vestry clerk should not pay to the prosecutors the costs of and occasioned by this application. This rule was founded upon the affidavit of *Charles Hibble*, wherein he deposed as follows:—The parish of St. Mary-le-Bone has adopted the provisions of the Vestry Act, (2 Will. 4, c. 60,) and the vestrymen are chosen under that act. On 4th July last the vestrymen so chosen resolved, "That no person be allowed to copy from the rate-books; and that, agree-

ably to the 32d section of the Vestry Act, no person be allowed to inspect the books of the vestry, unless he or she be a rate-payer, or creditor of the parish." Mr. *Hibble* being a rated inhabitant of the parish, subsequently made repeated applications, at seasonable times, to the vestry clerk, at the court house of the parish, for permission to inspect and to take copies of or extracts from the rate-books of the parish, which were then in the possession of the vestry clerk, at the court house of the parish. These applications Mr. *Hibble* founded upon the provisions of the Vestry Act, and especially on section 32. Inspection of the rate-books was allowed, but permission to take copies of, or extracts from, the rate-books, was, upon the authority of the above resolution, and after consultation with the vestry, refused by the clerk. The rate-books, from which Mr. *Hibble* was desirous of taking copies or extracts, are and do contain an account of monies received for and on account of parochial purposes, that is to say, for and on account of the poor-rates and of the rates made for various other parochial purposes. Applications have been also made by other rated inhabitants, for permission to copy or make extracts from the said rate-books, and in like manner refused.

The affidavits in opposition stated, that the *rate-books* of the parish do not contain a true and regular account of all or any sums of money received *and disbursed* for or on account of parochial purposes, nor of the several *articles, matters, and things*, for which such sums of money are received and disbursed. The rate-books for the current year are not kept at the court house, but are kept by the several rate collectors of the parish, to whom they are respectively delivered on or about 1st July in each year, and in whose possession they remain until the 30th June following. By the direction of the vestry-

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men, there is kept at the parish court house, under the management of the vestry clerk, a book in which true and regular accounts are entered of all sums of money received and disbursed for or on account of parochial purposes, and of the several *matters and things* for which such sums of money are so received and disbursed, and such book is at all seasonable times open to the inspection of any vestryman, or of any person or persons rated to the relief of the poor of the parish, or of any creditor or creditors on the same, without fee or reward; and the said vestrymen and persons, and creditors, or any of them, may take copies of, or extracts from, the said *last-mentioned book*, or any part or parts thereof, without paying any thing for the same. No such vestryman, person, or creditor, has ever been refused permission to inspect the last-mentioned book, or to take copies of or extracts therefrom. Mr. *Hibble* has never made any application to the vestry clerk for permission to inspect or take copies of or extracts from the last-mentioned book, but was refused permission to take copies or extracts from the *rate-book*, in pursuance of the resolution of 4th July.

*Campbell*, A. G., now shewed cause. This application is made under section 32 of Sir *John Hobhouse's* Vestry Act (2 *Will.* 4, c. 60;) but the book in question is not a book contemplated by that enactment, but is a book kept under the authority of a local act of 35 *Geo.* 3, c. 73. The book contemplated by the Vestry Act is an entirely *new* book, containing a *debtor* and *creditor* account. Such a book is actually kept within this parish, and the rate-payers are at all seasonable times permitted to inspect and take copies of or extracts from it.

This right to inspect the rate-book is regulated by 17 *Geo.* 2, c. 3, s. 2, which provides, that the church-

wardens, &c. of every parish, township, or place, shall permit all and every the inhabitants of the said parish, &c., to inspect every poor-rate, at all seasonable times, paying 1s. for the same; and shall give copies of the same, or any part thereof, to any inhabitant of the said parish, &c., paying at the rate of 6d. for every twenty-four names. [*Patteson, J.* That act speaks only of *rates*. The subsequent act of the same session of parliament (cap. 38) provides, that copies of all poor-rates shall be entered into a *book*. There is no provision for giving or taking copies of this rate-book, or any part of it; but it is merely provided, that it shall be kept in some public or other place, whereto all persons assessed, or liable to be assessed, *may freely resort*.] The applicant has had “free resort” to the *rate-book*, for he has been allowed to inspect it without restriction. The act of 17 Geo. 2, c. 2, provides only for the *giving* of copies upon making a certain payment. [*Patteson, J.* That act plainly refers to the rate itself, and not to the rate-books.] There is no general principle of law, independent of the acts of parliament, upon which this claim can be founded; and even if there were any such general principle, a *mandamus* ought not now to be granted, as the applications to the vestry clerk and to this Court, were made entirely upon the Vestry Act.

Sir *W. W. Follett*, and *Tomlinson*, *contrà*. It is a matter of great importance that the rate-payers should be allowed to copy or make extracts from the rate-book, as the other book mentioned in the affidavits does not state the *particulars* of the receipts and disbursements, so as to give the rate-payers the advantages intended. [*Lord Denman, C. J.* The rule is drawn up for permission to take copies of, and extracts from, the rate-book of the parish, and all other books mentioned or referred

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to and declared to be at all seasonable times open to all rate-payers, &c. by the act of 2 *Will.* 4:—Must you not, consequently, bring the rate-books within the 32d section of that act?] It is submitted, that if the parties have a right, from whatsoever source it may be derived, this rule may be made absolute. [*Patteson*, J. You have drawn up your rule much too wide. You have deceived the vestry, by claiming under the Vestry Act, and you mislead the Court in the same way. Besides, you claim the right for all persons mentioned in that act.] The rule may be made absolute for *W. Hibble*, the applicant, only. The question turns upon the local act of 35 *Geo.* 3, c. 73, s. 179, and Sir *John Hobhouse's* Act. The local act requires poor-rates, highway rates, watch rates, paving rates, and rates for cleansing and repairing the streets, &c. to be made; and requires that all rates made and assessed by virtue of that act shall be entered in a book or books, in which the arrears of the preceding year are to be stated, and also the arrears remaining due at the end of the year, to be carried out to the succeeding account. Under this act, the rates are made in the book in question, and there signed by the vestrymen. This book contains the only account of the specific sums received by the vestrymen. The book mentioned in the affidavits in opposition does not contain the “*articles, matters, and things*,” for which the sums of money received and disbursed by the parish authorities are so received and disbursed. It is stated to contain the “*matters and things*,” without mention being made of “*articles*,” which seems to mean the *particulars*; and the fact is, that that book only contains the general result of the accounts. Thus the whole sum received in respect of a rate is stated, but the individual assessments are only to be found in the rate-book. For the purposes of an election, or of the revision of the

lists of voters, it is very important that the particulars or individual assessments should be certainly known, and this can only be by taking copies or extracts. The rate-book, and books containing the particulars of disbursements, must be regarded as if they were in form schedules to the new book, and the rate-payers must, therefore, be entitled to take copies of and extracts from them. But regarding the question as independent of the act of 2 Will. 4, c. 60, the claim may be supported; for this book being in fact the rate itself, the rate-payers have a general right to take copies of it or any part of it. The act of 17 Geo. 2, c. 3, provides for the *giving* copies of the rate, upon making certain payments. The right to *take* copies exists independently of that or any other act. [*Little-dale*, J. I take it, that it was intended by the local act that *copies* should be entered in a book.] The justices sign the book, and there is no other original. In *Rex v. The Justices of Leicester* (*a*), a mandamus was granted, commanding the justices and clerk of the peace of a borough, to permit an attorney, on behalf of several persons, who contributed to the county rate, to inspect and take copies of the last two rates made by the justices, and all orders made for the expenditure of the same, and the several orders of sessions made thereon, and other proceedings and documents relating thereto. [Lord Denman, C. J. We have some doubts whether that case was well decided.] It is submitted, that the Court have a general jurisdiction to compel the parish officers to permit all rate-payers to take copies of or extracts from the rate; and that under 2 Will. 4, c. 60, where the items of the parish accounts are distributed in several documents, all may be considered as included within the enactment authorizing the making of copies and extracts. [*Little-dale*, J. I do not see how you can go further than demand

(*a*) 7 Dowl. & Ryl. 370; 4 Barnw. & Cressw. 891; 3 D. & R. Mag. Ca. 433.

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to have copies given to you of the *rate*, by analogy to 17 Geo. 2, c. 3.] That would be as well in this case. In *Rex v. Justices of Leicester* (a) the Court went further. Unless the rate or rate-book be open in the manner now claimed, the party dominant in the vestry will be able to prevent the opposite party from making the inquiries required for purposes connected with elections (b).

Lord DENMAN, C. J.—We will take time to consider whether we have power to compel the vestrymen to permit the rate-payers to take copies of this book.

*Cur. adv. vult.*

On a subsequent day in the term,

Lord DENMAN, C. J., said,—The complainant says that he cannot obtain the information necessary for the purposes relating to elections of members to serve in parliament, unless he be allowed to take copies of or extracts from this book. Upon consideration, we think that we are not authorized by any general principle, or by either of the acts of parliament referred to in the argument, to make the rule absolute. The rule must, therefore, be discharged, but without costs.

Rule discharged, without costs.

(a) 7 Dowl. & Ryl. 370; 4 Barn. & Cress. 891; 3 Dowl. & Ryl. Mag. Ca. 433. And see *Rex v. Trustees of St. Pancras New Church*, ante, v. 245, 3 Adol. & Ellis, 535.

(b) A prisoner is not entitled to a habeas corpus for the purpose of enabling him to vote at an election. *Jones, ex parte*, 4 Nev. & Man. 340.



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## The KING v. JOHN WILSON.

IN Michaelmas term last, *M. D. Hill* obtained a rule, calling upon the prosecutors to shew cause why the inquisition found in this case should not be quashed, and why a writ of re-restitution should not be awarded.

The affidavits upon which this rule was obtained stated, that the defendant had, on September 3, 1833, been convicted of a forcible detainer (*a*), upon an information exhibited against him by *Bates* and *Styles*; that he gave notice to the convicting magistrates that he traversed the force alleged to have been used by him, touching the possession of the premises; that on September 10th, an inquisition was held before the two convicting magistrates, and Mr. *Wetherall*, another magistrate; that on that occasion the original information was lying upon the table, and the parties were heard, and their witnesses were examined upon oath; and that the jury found a verdict against the defendant.

The inquisition, as returned to the writ of certiorari issued in this case, was in the following words:

"County of Leicestershire, to wit. An inquisition for our Sovereign Lord the King, indented and taken at the Town Hall of Market Harborough, in the said county, the 10th day of September, in the fourth year of &c., (4 W. 4,) by the oaths of twelve good and lawful men of the said county, before the Rev. *Edward Griffin* and *John Wetherall*, clerks, and *Wm. de Capel Brooke*, Esq., justices &c., assigned &c.; who say, upon their oaths aforesaid, that *John Wilson*, of Market Harborough aforesaid, carpenter, on the 28th day of August now last past, into and upon one messuage, with the appurtenances, in Market Harborough aforesaid, in the county aforesaid, whereof *Thomas Bates*, of &c., watch-maker, and *John Styles*, of &c.,

To a writ of certiorari the justices returned a conviction of one *A. B.* for a forcible detainer, together with an inquisition, upon a traverse by *A. B.* of the force, &c., taken a few days subsequently to the date of the conviction, which found an unlawful entry and forcible detainer by *A. B.*,—and an award of restitution indorsed upon the inquisition. The conviction having been quashed for insufficiency, it was held that the inquisition must be quashed also, and that the Court is bound to grant restitution, without entering into any inquiry as to the title of the respective parties.

(*a*) See the form of the conviction, *ante*, ii. 385.

Held also, that an inquisition finding a party guilty of an unlawful entry and forcible detainer, upon the face of which it does not appear that a complaint had been made, or by what authority or for what purpose the jury had been summoned, is defective.

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grocer, were then lawfully and peaceably seised to them and their heirs, in their demesne as of fee, 'unlawfully did enter, and the said *Thomas Bates* and *John Styles* from the messuage aforesaid unlawfully ejected, expelled, and amoved, and the said messuage from them the said *Thomas Bates* and *John Styles* unlawfully, with strong hand and armed power, did hold and from them detain; and from the said 28th August now last past, until the day of the taking of this inquisition, with like strong hand and armed power, did keep out, and doth yet keep out, to the great disturbance of the peace &c., and against the form of the statute in such case made and provided.

"We whose names are hereunto set, being the jurors aforesaid, do, upon the evidence now produced before us, find the inquisition aforesaid true."

"Signed, &c."

Upon the above inquisition the following memorandum was indorsed:

"County of Leicester. Be it remembered, that we *Edward Griffith* and *John Wetherall*, clerks, and *Wm. de Capel Brooke*, Esq., justices in the within inquisition named, did, this 10th day of September, in the year &c., personally go to the messuage and other the premises in the within-written inquisition mentioned, and did re-seize the same, with the appurtenances, and did restore and put the within-named *Thomas Bates* and *John Stiles* into full possession thereof, according as they before the entry and forcible detainer thereof by *John Wilson*, in the said inquisition mentioned, were seised, according to the form of the statutes in such case made and provided. Given under our hands and seals.

"Signed and sealed &c."

The conviction was, upon a former application to this Court, quashed (a), and upon that occasion the Court expressed an opinion that the inquisition, being founded upon the conviction, must be quashed also; but the argument having been upon a concilium with reference to the conviction only, the rule was drawn up for quashing the conviction alone.

The affidavits on both sides contained statements of facts, upon which *Bates* and *Stiles* on the one hand, and *Wilson* on the other, claimed to be entitled to the messuage mentioned in the proceedings.

(a) See the Report, *ante*, 233.

Sir *W. W. Follett* now shewed cause. This case has already been twice before the Court: first, upon an application for a mandamus to the justices, requiring them to amend their return to the certiorari which had issued (*a*), and afterwards, upon a motion to quash the conviction (*b*). In giving judgment upon the latter occasion, Lord *Denman*, C.J., having said that the conviction was bad, added, "It follows, that the inquisition founded upon it must also be quashed." In that case the inquisition was not before the Court, and therefore the dictum of Lord *Denman* was extra-judicial, and cannot be referred to as any authority in support of the present application. The conviction may be bad, and yet the inquisition be valid. The inquisition is independent of the conviction, and is taken under sect. 3 of the statute 8 *Hen. 6*, c. 9, which enacts that the justices shall have power to inquire *by the people* of the county, as well of them that make forcible entries on lands and tenements as of them which the same hold with force; and if it be found before any of them that any doth contrary to that statute, then the said justices or justice shall cause to re-seize the lands or tenements so entered or holden, and shall put the party so put out in full possession of the same lands and tenements so entered and holden. The 4th section provides for the summoning and impanelling a jury for the purpose of making such inquiry. Now here a jury was impanelled, the party was summoned, witnesses were examined, and the jury have found an unlawful entry and a forcible detainer. This is an independent proceeding, and it is perfect in itself. It seems to be expressly within the 3d section of the statute 8 *Hen. 6*, c. 9, and if so, the right of the justices to award restitution follows of course. The conviction was for

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the purpose of arresting and fining the defendant, and if the conviction was bad, then the justices were wrong in committing him to prison; but it does not follow that the award of restitution is wrong, for that is founded upon the inquisition. Supposing, however, that the inquisition is based upon the conviction, and falls with it, still the right to a writ of re-restitution cannot be claimed as a necessary consequence. The power to grant re-restitution is only founded upon an equitable construction of the statutes, and is not exercised when upon a consideration of the whole of the circumstances the defendant appears to have some right to the tene-ments; 1 *Russell on Crimes*, 293. In *Rex v. Harris*<sup>(a)</sup>, the Court having said that re-restitution should be granted, it was prayed that since restitution was matter of favour of the Court, and not of right, the Court would not grant it unless they would consent to try the right, and it was said that re-restitution was refused to be granted in the *Vicar of Hadley's* case, until the right was settled by a trial. "But," per *Holt, C. J.*, "he has known re-restitution granted in this manner, viz. that they should bring the writ of re-restitution with them to the assizes, and if the verdict upon the trial should be with them, that they should execute it immediately. And (by him) where the first restitution was just, and the inquisition is quashed, then the granting of re-restitution is discretionary; but when the first restitution was tortious, then re-restitution ought to be granted of right." Therefore it becomes necessary to look at the affidavits, in order that the Court may see whether, upon the whole of the facts, the defendant is not justly entitled to have the discretion of the Court exercised in his favour, by a refusal to grant re-restitution. (He then commented on

(a) 1 Lord Raym. 482.

the facts stated in the affidavits, relative to the respective titles of the parties.)

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*Hill*, *contra*. On the occasion when this case was last before the Court, it was argued, that the inquisition must be quashed as ancillary to the conviction, and so the Court decided. The opinion expressed by the Court on that occasion would have been conclusive, but for the fact that the inquisition was not then formally before the Court. The inquisition is ancillary to the conviction. It was the trial of a traverse, and not a substantive proceeding; and if it be a substantive proceeding, then it is bad for not stating a complaint. The connection between the conviction and the inquisition is clearly shewn upon the affidavits. The defendant traversed the force. Therefore the jury were summoned, and the only question which they had authority to try was the force. This conviction has been treated as if it were in the nature of a summary conviction; and this mistake has led to some important errors. In the time of *Henry 6*, summary convictions were unknown. Justices had not at that time power to examine witnesses, and make findings of facts; but the facts were required to be found by a jury upon a traverse; 1 *Paley on Conviction*, Introduction, p. xxix. 2d edition. The difficulty that has been felt with respect to *Regina v. Leighton*, is owing to the distinction between a conviction on this statute and summary convictions not having been duly kept in view. That case was supposed to have had no legal termination; but it appears from *Fortescue's Reports* (a) that the conviction was ultimately affirmed. In that case there was no *finding* of an unlawful entry; and on that ground this Court thought that the conviction might not have been confirmed. Yet it was confirmed;

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and the reason must have been this, that, as it appeared on the conviction that there had been information of a forcible entry, and there had been no traverse of the information, the justices, who could not of themselves find facts, were bound to convict upon the information. The traverse raises a kind of issue. This inquisition was for the trial of such an issue, as appears by the affidavits, although it must be admitted that, upon the face of the inquisition, it appears to have been a substantive proceeding. [*Patteson* J. Was not the traverse nugatory? It is laid down that you cannot traverse a conviction *upon view*. Must not the traverse be of the *inquisition*? There is no power of restitution given, except after the verdict of a jury (*a*). In order, therefore, to give the justices the power of restitution, they are obliged to have an inquisition. The justices may, therefore, have intended it as an independent proceeding.] It does not appear that this was so. It is stated that a traverse was taken by the defendant, and is not shewn on the other side that the justices intended to proceed independently. Besides, in order to give the magistrates jurisdiction to assemble a jury, and hold an independent inquisition, there must have been a complaint, and such complaint must have been recited. No complaint is recited, and therefore the inquisition, as a substantive proceeding, is not well founded. [*Patteson*, J. The words "after complaint" occur only in the second section.] But they extend not only to the proceeding mentioned in that section, but also to the proceeding by inquisition mentioned in the following clause. But besides this, the necessity for a complaint follows from general principles of law. Justices are not to go

(*a*) In *Rex v. Hake*, 4 Mann. & Ryl. 483, 2 Mann. & Ryl. Mag. Ca. 353, restitution was awarded before trial upon an indictment for a forcible entry being found by the grand jury.

abroad searching for offences of this sort, but they must proceed upon complaint only. If there be no complaint, the justices have no jurisdiction; and if no complaint be recited in the proceedings of the justices, then it will be assumed that they had no jurisdiction, for the jurisdiction ought to appear. This is so in the case of a summary conviction, to which this inquisition is analogous. [*Patteson*, J. Lord *Holt* lays it down that the statement of a complaint is a necessary part of a conviction, but not of an indictment. What is there to shew that it must appear on an inquisition?] This is a statutory jurisdiction or power. The superior Courts must be able to see, upon the face of the proceedings, that the case was within the authority of the inferior jurisdiction. [*Patteson*, J. The inquisition is, strictly speaking, only the finding of the jury. If the complaint is to appear on the inquisition, it must be in the way of some heading—in the form of a caption.] Probably so. But certainly it seems to be necessary that it should appear in some form. [Sir *W. W. Follett* here observed, that in *Burn's Justice*, tit. *Forcible Entry and Detainer*, S. vi. (a), (citing *Lambard's Eirenarcha*), it is said, "Yet these words ('after complaint by the party grieved,') do not enforce any necessity of such a complaint; for it is holden, that the justices may and ought to proceed upon any information or knowledge thereof whatsoever, though no complaint at all be brought unto him by any party grieved thereby;" and that the form of an inquisition given in *Burn's Justice* says nothing of a complaint.] *Burn* and *Lambard* were both writing on criminal law, and that which they say must refer to *convictions*. Perhaps if justices *saw* a forcible *entry*, they would be bound to interfere, although no complaint had been preferred.

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(a) Page 798 (26th edition), vol. v. p. 230, ed. 1836.

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Then as to the writ of re-restitution: it is true that the Court may refuse to grant it, if the other party appears to be equitably entitled to the tenements; but the contrary appears upon the affidavits. (He then commented upon the affidavits as to this point.)

Lord DENMAN, C. J.—We will look at the proceedings. We will inform you whether we want the affidavits.

*Cur. adv. vult.*

On a subsequent day in the term, the judgment of the Court was delivered by Lord *Denman*, C.J., as follows:—In this case, which has been before the Court on a former occasion, we are moved to quash an inquisition, and award a writ of re-restitution, in pursuance of our former judgment, which set aside the *conviction* of the defendant by magistrates, for the offence of a forcible entry, and in which we expressed our opinion that the *inquisition* founded upon it must also be set aside. The grounds of that judgment were fully stated, and have not been questioned in the argument on this rule. But it was said that, however defective the conviction, the inquisition being the act of a jury, regularly brought together, and the result of an examination of witnesses, at which both parties assisted, ought not to be set aside. We are, however, of opinion, that as the inquisition was founded on the conviction, which turns out to be a complete nullity, for reasons which it is unnecessary now to repeat, the inquisition also is a proceeding without any warrant of law, and must be set aside. Whether it may have any effect as evidence in other controversies between the parties, we need not now consider. But indeed the inquisition is in every other respect wholly inoperative, its use being to give

effect to a conviction, which is of course impossible, where the conviction itself is void. If it could be permitted to stand as a part of the proceedings, it would appear to justify the transfer of possession worked by the conviction, when the conviction itself is given up as indefensible; which cannot be permitted. And the inquiry, if taken by itself, without reference to the conviction, is itself defective, inasmuch as it does not shew that any complaint had been made, nor by what authority or on what account the jury were summoned.

But the defendant would gain nothing by our judgments, if we should merely declare the proceedings null: Another step is necessary on the part of the Court, in order that full justice may be done him. If we allow him to remain dispossessed of the premises held before, full effect will be given to an act which we have pronounced wrongful. A writ of re-restitution is prayed to prevent this consequence, and the original complainant has stated his objections to our awarding that writ. On looking into the authorities, we find that the Court has been in the habit of awarding that writ, when it has quashed the conviction for forcible entry (*a*); otherwise the whole proceedings here would be nugatory; and the practice is accordingly said to have grown out of an equitable construction of the statutes.

It has been said that the Court will not do this, unless the party unlawfully dispossessed should appear to have *title* to the premises,—a most inconvenient inquiry upon affidavit, and a course full of danger to the public peace, as protecting the execution of an unlawful sentence. But in *Rex v. Jones* (*b*), the Court declared, even in a case where the conviction was quashed for a

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(*a*) 1 Hawk. P. C. c. 28, s. 65. Entry O; 3 Bac. Abr. Forcible  
 66; 13 Vin. Abr. tit. Forcible Entry G.

(*b*) 1 Stra. 474.

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merely technical error, and the lease of the dispossessed person had expired during the litigation, "that they had no discretionary power in the case, but were bound to award restitution (*i. e.* *re*-restitution) on quashing the conviction."

This rule, therefore, for quashing the inquisition must be made absolute, and re-restitution will also be awarded.

Rule absolute.

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Where a parish is divided into four tithings separately maintaining their own poor, and having separate overseers, and by custom the inhabitants of each tithing, at a general parish meeting, separately choose a churchwarden, and each of the churchwardens, though sworn in the usual form, to the faithful execution of the office within his *parish*, acts only for the particular tithing for which he is chosen, except that all the four churchwardens unite in signing the annual presentment to the archdeacon, of the state of the repairs of the church, and other presentable matters;—each of such persons is a churchwarden for the whole parish.

UPON an appeal by *John Marsh*, against a poor-rate, in respect of three pieces of land, signed by the churchwarden and overseers of the poor of the tithing of Alkington, in the parish of Berkeley, the sessions confirmed the rate, subject to the opinion of the Court on the following case:—

The whole question was, whether the three pieces of land are in the tithing of Alkington, or in the parish of Leonard Stanley. Up to 17th November, 1832, they had been rated to Alkington.

Therefore, where a commissioner for inclosure of lands in an adjoining parish served upon the churchwarden acting for one of such tithings, a description of an ascertainment of boundaries between another of the tithings and such adjoining parish, such service is a sufficient compliance with the requisitions of 41 *Geo.* 3, c. 109, s. 3.

Where the validity of such an ascertainment of boundaries is disputed, on the ground that the description was not served upon a proper officer, the Court will require such ground of objection to be fully and convincingly made out.

And it was held, that in such a case evidence that the commissioner, before ascertaining the boundaries, had not given the required notices, and had received evidence not upon oath, was not admissible.

*Semble*, that a churchwarden continues in office until his successor is sworn in.

An act of 11 *Geo.* 4, c. 7(a), passed for the inclosure of (inter alia) lands in the parish of Leonard Stanley, and it recited the General Inclosure Act (b).

17th November, 1832. The commissioner appointed under 11 *Geo.* 4, c. 7, made the following determination with reference to the boundaries of the parishes of Leonard Stanley and Berkeley (which adjoined).

"Whereas, by an act, passed &c., (11 *Geo.* 4, c. 7,) I, the undersigned, *Daniel Trinder*, was appointed commissioner for carrying the same act into execution; and whereas disputes or doubts having arisen whether certain old inclosures, called respectively the 'Ham,' the 'Langett,' and 'Motford,' (all of which are part of the estate of the Rev. *Thomas Heberden*, and are in the occupation of *John Marsh*, as his tenant,) are parcel of the parish of Stanley St. Leonard's, otherwise Leonard Stanley, or of the parish of Berkeley, I the said *D. F.*, in pursuance of the powers, and in compliance with the provisions contained in the said act, and the therein recited act, have ascertained the boundaries of the said parishes respectively, where they adjoin each other, and do hereby set out and determine and fix that the said inclosures respectively are parcel of the parish of Stanley St. Leonard's, otherwise Leonard Stanley."

The sessions thought that, under the provisions of 41 *Geo.* 3, c. 109, s. 3, it was necessary to have proof that the means of appeal had been afforded by a due service of the descriptions of boundaries, as therein provided; but that if this had been done, no appeal having ever taken place, they could not now inquire by what means and through what steps the commissioner had arrived at his decision; and they interrupted evidence, which had been commenced as to that point, particularly

(a) Private act.

(b) 41 *Geo.* 3, c. 109.

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as to his having examined witnesses, without oath, and as to the existence of disputes, before his perambulation commenced, concerning the boundaries in question.

With regard to the proper services of the description of boundaries, a question arises upon these circumstances: Berkeley parish is divided into four tithings, viz. Berkeley town, Alkington, Ham, and a fourth composed of Hinton, Hamfallow, and Breadstone. There is but one church, which is in Berkeley town, and one chapel of ease, which is in Ham. Each of the tithings has a separate poor-rate, and they manage their poor separately, and remove paupers from one tithing to another. Berkeley, Alkington, and Ham, have each one churchwarden and two overseers; Hinton and Hamfallow have an overseer each, and Breadstone two; and there is one churchwarden for the three. The churchwardens for all are appointed at Berkeley. The following is the form of the appointment.

"At a vestry meeting, held in the vestry room of the parish church of Berkeley, this                      day of                      , the following persons were nominated as proper persons to serve the office of churchwardens for the town and tithings for the year ensuing, viz.:—

*A. B., C. D., E. F., G. H.*

"In the presence of us" (here follow the signatures of the parishioners assembled in vestry.)

The outgoing churchwarden generally nominates his successor for the same tithing; but in case of a dispute, the inhabitants of one tithing do not vote in the election of churchwarden of another. None are chosen churchwardens of either of the tithings, but such as are inhabitants of that particular tithing. Berkeley Church is repaired by church-rates, levied separately on the tithings.

The description of boundaries was served 23d November, 1832, by the commissioner, duly, as regarded the parish officers of Leonard Stanley and the lords of the manors, but not on any churchwarden or overseer in

respect of Alkington, as distinct from the rest of the parish of Berkeley. It was served on one *Seaborne*, who had been duly elected churchwarden of Berkeley town for the preceding year, but whose original year of office was expired, and who continued to act in consequence of the person appointed as his successor not having been sworn in.

The questions are—1st, Whether the quarter sessions ought to have received evidence as to the steps taken by the commissioners, and the other circumstances, prior to his adjudication. 2dly. Whether they were entitled to require proof of the due service of the description of boundaries. 3dly. Whether, if so, service on the churchwarden of Berkeley town was sufficient. 4thly. Whether *Seaborne* could be considered as such churchwarden.

*Campbell, A.G.*, and *Greaves*, in support of the order. The sessions have come to the conclusion that the land in question is ratable in the tithing of Alkington, and not in the parish of Leonard Stanley. This conclusion, it is submitted, is right; for that the adjudication of the commissioner is inoperative.

The third section (a) of the General Inclosure Act (41 Geo. 3, c. 109), under which the award was intended to

(a) By which, after reciting that disputes or doubts might arise, concerning the boundaries of parishes, manors, hamlets, or districts, to be divided and inclosed, and of parishes, &c. adjoining thereto, commissioners of inclosure were authorized and required, by examination of witnesses upon oath or affirmation, and by such other legal ways and means as they should think proper, to inquire into the bound-

daries of such several parishes, manors, hamlets, or districts; and in case it should appear to such commissioners that the boundaries of the same respectively were not then sufficiently ascertained and distinguished, such commissioners were authorized and required to ascertain, and set out, determine, and fix the same respectively, and after the said boundaries should be so ascertained, &c., the same should

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be made, gives to commissioners of inclosure jurisdiction to ascertain and settle the boundaries of parishes, &c. only upon certain terms or conditions; and as the jurisdiction was thus limited or conditional, the award should have recited a compliance with those conditions. The commissioner should have stated the nature of the evidence upon which he acted, and that the examination of witnesses was upon oath. It should have appeared also that the previous notices required by the act had been duly given; *Bruyeres v. Halcomb* (a), *Rex v. Croke* (b). [*Coleridge, J.* Is that point open to you?] In *Rex v. Croke* it was held, that where, by a statute, a special authority is delegated to particular persons, affecting the property of individuals, it must be strictly pursued, and appear to be so on the face of the proceedings. Here it is not so made to appear. Besides, the commissioner was entirely without jurisdiction, unless the conditions

and were by that act declared to be the boundaries of such parishes, manors, hamlets, or districts. Proviso, that such commissioners (before they should proceed to ascertain and set out the boundaries of such parishes, &c.) should and they were thereby required to give public notice by writing, to be fixed on the most public doors of such parishes, and also by advertisement in a newspaper, and also by writing, to be delivered to or left at the last usual place of abode of the respective lords or stewards of the lords of the manors, in which the lands to be inclosed should be situate, and of such adjoining manor or manors, ten days at least before the time of setting out such

boundaries, of their intention to ascertain the same respectively; and that such commissioners should, within a month after their ascertainment and setting out the same boundaries, cause a description thereof, in writing, to be delivered to or left at the last place of abode of *one of the churchwardens or overseers of the poor of the respective parishes*, and also of such respective lords or stewards." Further proviso for appeal to the quarter sessions against such determination within four months after the publication thereof, by delivering or leaving such description as aforesaid.

(a) 5 Nev. & Mann. 149.

(b) Cowp. 26.

had been duly complied with; and although, according to the very recent decision in *Rex v. Whiston* (a), if the order be good upon the face of it, it will be presumed, *primâ facie*, that the commissioner had, before adjudicating, done all that it was his duty previously to do, yet that presumption may be answered by negative evidence. Consequently the sessions were wrong in excluding the evidence, by which it was proposed to shew the want of jurisdiction; *Welch v. Nash* (b).

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II. The adjudication was inoperative, because the description of the ascertainment and setting out of the boundaries required to be delivered within one month afterwards, was not delivered to any officer of Alkington. The delivery to *Seaborne* was not sufficient; first, because he was churchwarden of the township of Berkeley only; and, secondly, because the time for which he had been appointed was expired, and a successor had been appointed, though not sworn in.

Lord DENMAN, C. J., stopping *Greaves*, said, We should like to hear the argument on the other side as to the notice.

*W. J. Alexander and Cripps*, *contra*. The service of the description or notice upon the lords of the manor and upon the churchwardens, need not, in a proceeding of this sort, be shewn, in order to support the adjudication. The words of the section as to the service of this notice are *directory* only. But supposing them to be *imperative*, the requisitions of the statute in this respect have been complied with. *Seaborne* was one of the churchwardens of the parish interested. The four churchwardens are appointed generally for the *whole*

(a) *Ante*, 514; 4 Nev. & (b) 8 East, 394.  
 Mann. 65.

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*parish*, although it appears that the practice is for each to *exercise* the office separately, within a particular tithing. The statement in the case that each of the tithings has a churchwarden, must be taken *sub modo*. Each churchwarden has in reality a general control over all the parish. [*Williams, J.* That seems to be at variance with *Rex v. Nantwich (a)*]. In that case the Court decided with hesitation: *Grose, J.* had so much doubt upon the point that he declined expressing any opinion. The decision is opposed to *Spitalfields v. Bromley (b)*, which has lately been recognized (c), and which decides that magistrates are not bound to take notice of the division of parishes into townships. Besides, that decision only relates to churchwardens in their additional character of overseers of the poor. There can be no such officer as churchwarden of a *tithing*. The office of churchwarden originated with the statute of *Hen. 8 (d)*, and can only exist in *parishes*, or reputed parishes; and there is no pretence for saying that these *tithings* can be regarded as parishes, or reputed parishes. In *Rudd v. Morton (e)*, which was *replevin*, in which the defendant avowed as overseer of the poor, the question was, whether Stratton was a reputed parish of itself, or part of the parish of Biggleswade, in Bedfordshire. “*Et per Cur.* To make

(a) 16 East, 235.

(b) 18 Vin. Abr. 468; 2 Bott, 684; 1 Nol. P. L. 145, 232; Burn. Just. *Poor*, 753, 24th ed.

(c) In *Rex v. Bishop Wearmouth*, ante, vol. ii. 83; 3 Nev. & Mann. 77; 5 Barn. & Adol. 942.

(d) But see actions by churchwardens of a much earlier date, — trespass against vicar for breaking a bell, M. 11 H. 4, fo. 12, pl. 25; trespass for a

book, T. 8 E. 4, fo. 6, pl. 5; trespass, and appeal of robbery, for goods, T. 12 H. 7, fo. 28, 29, pl. 7; and M. 13 H. 7, fo. 9, 10, pl. 5, where it is said that, though parishioners and churchwardens are incapable of purchasing land, and are therefore incapable of taking a use, yet by *ancient* law they may become purchasers for goods.

(e) 2 Salk. 501.

Stratton a reputed parish, within 43 *Eliz.*, it must have a parochial chapel, and chapelwardens and sacraments, at the time the statute was made; and because the pretended parish of Stratton had but one chapelwarden, whose office it was to collect the rates taxed upon Stratton, and pay them to Biggleswade, they were held part of the parish of Biggleswade, and not a reputed parish within 43 *Eliz.*; and their having a distinct overseer, and maintaining their own poor, was not thought sufficient to make them a distinct parish." Churchwardens are always regarded as officers for the whole parish, and the churchwarden's oath is "truly and faithfully to execute the office of churchwarden, within your *parish*, and to present things and persons presentable by the ecclesiastical laws,"—no mention being made of divisions other than parishes. Upon the strict words of this statute, it is submitted, that *Seaborne* was a proper person to be served with the notice in question. For some purposes he may be considered as a *more* proper person than the churchwarden who executed the office in Alkington; because the parish church was in the township of Berkeley, and the churchwarden, acting for the township, would consequently have the care of the registers of births and deaths, and of the parish chest. Besides, the notices required to be given by the commissioner before he proceeds to ascertain and fix the boundaries, are to be affixed on the door of the parish church; and as for this purpose he would have had to apply to *Seaborne*, he might consequently be expected to look to him as the officer to whom the subsequent notice also should be given.

Lord DENMAN, C. J.—Our doubt as to the sufficiency of the notice also extended to the point as to whether *Seaborne* was to be considered as out of office.

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The office of churchwarden is an ecclesiastical office, and is governed by the canon law. By canon 118, it is expressly ordered, that "churchwardens shall continue in office till the new churchwardens be sworn (a)." [Greaves. That is overruled by an anonymous case in 1 *Ventris* (b), acted upon in *Rex v. Corfe Mullen* (c). Lord Denman, C. J. That case only shews that custom may prevail over the canon. *Littledale, J.* It only shews that the new churchwarden *may* act before he is sworn in, which is consistent with the continuance in office of the old churchwarden, according to the canon.] In the text books, the 118th canon is considered as operating to continue churchwardens in office until their successors are sworn in. The case in *Noy's Reports*, 139, referred to in 1 *Ventris*, does not bear out the proposition for which it is cited. [*Littledale, J.* In Com. Dig. Eglise (F 1), it is said, that by canon 10 *Jac.* 89, churchwardens shall continue in office but one year, except chosen again in like manner. But by canon 118, they shall be reputed to continue till new churchwardens sworn.]

The COURT now called upon *Greaves* to resume his argument.

*Greaves.* According to the argument, *contra*, if the question had been with respect to the boundaries between the township of Berkeley and the tithing of Alkington, notice to the churchwarden who in fact represented the township of Berkeley, would have been sufficient, although Alkington and the township of Berkeley would have had conflicting interests. The object of requiring the notice to be given is, that the inhabitants of the dis-

(a) See 1 Burn's Justice, 602,  
 24th ed.

(b) 1 Vent. 267.

(c) 1 Barn. & Adol. 211.

strict interested may have an opportunity of appealing. Here, Alkington and not Berkeley was the district interested; and therefore the notice should have been served on some parochial officer of Alkington. [*Cole-ridge, J.* The churchwarden of Berkeley *had* an interest, because Alkington was contributory to the church-rate.] Yes; but it is submitted that the service of the notice is to be on the churchwardens, not as such, but as overseers, for it is put in the alternative. It is to be given to one of the churchwardens or overseers of the poor. Where a parish is divided into different districts, the churchwardens have nothing to do with matters pertaining to the districts individually; 2 & 3 *Ann.* c. 6, s. 3; 17 *Geo.* 2, c. 38, s. 15; *Rex v. Clifton* (a), *Rex v. St. Margaret, Leicester* (b), *Rex v. Nantwich* (c), were referred to upon this point.

New churchwardens having been appointed, though not sworn in, *Seaborne* was not, *de jure*, a churchwarden of the parish. The decision in 1 *Ventris* appears to overrule the canon, because it shews that a new churchwarden is *in* the office, before he is sworn in, and there cannot be two persons in the office at the same time: *Rex v. Corfe Mullen* confirms this view. A churchwarden is a temporal officer. In *Stutter v. Freston* (d), it was said, that churchwardens are a corporation at common law, and are different from questmen, who are the creatures of the Reformation, and came in by canon law. And in *Dawson v. Fowle* (e), it was said by *Hale, C. B.* "Churchwardens are lay incorporations: and to many purposes they are temporal ministers and officers, as appears by many acts of parliament, 43 *Eliz.*, concerning the poor, and maimed soldiers, &c." A

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- (a) 2 East, 168.
- (b) 8 East, 332.
- (c) 16 East, 228.

- (d) 1 Strange, 52.
- (e) Hardres, 378.

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churchwarden is therefore a temporal officer, and his election as such by the parishioners gives him the office. The swearing in has been required by the canon law; but the churchwarden appears, from the decisions, to be invested with the office immediately upon his *appointment*, as was the case originally, before the canon law imposed the necessity of taking an oath of office.

After consultation the Court sent back the case to be re-heard on the following four points; viz.—

1st. Whether any custom prevailed respecting the churchwardens.

2dly. As to the precise form of the appointment.

3dly. As to the form of the oath of office.

4thly. Whether any of the churchwardens act out of their respective tithings.

And thereupon the following supplement was added to the case :—

1st. By custom in the parish of Berkeley (divided as it is into the several tithings, as mentioned in the case,) there are four churchwardens, the customary mode of electing whom is as follows: A notice is given in the parish church that the churchwardens desire a meeting at the vestry on Easter Tuesday to choose churchwardens for the town and tithings for the year ensuing. At the meeting held in pursuance of such notice, an inhabitant of each tithing is separately proposed and nominated as the new churchwarden for such tithing. The churchwarden for the tithing of Alkington is usually nominated first in order, and afterwards the rest one after another. It is customary for the outgoing churchwarden of each tithing to propose his successor, and the person so proposed is usually nominated without opposition; but in case of opposition, then the successor is nominated by the majority of the inhabitants, then present, of the

tithing for which he is to serve, and in this nomination the inhabitants of the other tithings never interfere. As far as living memory goes, each churchwarden has been an inhabitant of the tithing for which he served.

2dly. After the nomination of the churchwardens as aforesaid, a minute thereof is usually made in the form set out in the case, for presentation to the archdeacon, at his annual visitation. No other minute or appointment is made or delivered to any of the churchwardens.

3dly. They are all sworn in together, at the archdeacon's visitation; the oath administered being in the following form:—

“You and each of you shall swear truly and faithfully to execute the office of churchwarden within your parish, and according to the best of your skill and knowledge, present such things and persons as to your knowledge are presentable by the laws ecclesiastical of this realm. So help you God, and the contents of this book.”

4thly. No churchwarden ever acts out of the tithing for which he is appointed, except the signing the presentments annually made to the archdeacon, of the state of repair of the church, and other presentable matters, which are signed by all four churchwardens, can be so considered. There is no church-rate made for the tithing of the town of Berkeley, but the church is repaired by rates out of the other tithings. When a sum of money is required for other expenses, towards which the church-rate is applicable, the parish clerk, who is also vestry clerk, divides the amount required into three equal parts, and makes a separate rate for each of the three other tithings, for one-third, although the extent and value of such tithings are not equal. Such rate is allowed by the inhabitants of each of such tithings in vestry. The rate when collected is paid to the vestry clerk, who keeps separate accounts for each of the

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churchwardens, and such accounts are allowed by the inhabitants of each of such tithings.

The case was again argued in this term.

*Campbell, A. G., and Greaves*, in support of the order. Upon the whole of the facts stated, *Seaborne* is not shewn to be churchwarden of Alkington, or of the whole parish, but of the township of Berkeley only. The different tithings maintain their own poor separately; they remove paupers from one to another; and they have a separate church-rate for each of the three tithings that contribute at all to the repairs of the parish church, which rate is allowed by the inhabitants of each tithing in vestry, and is equal in each of them, although the extent and value of the several tithings are not equal. And one churchwarden is chosen for each tithing, by the inhabitants of such tithing respectively, and is always an inhabitant of the tithing for which he is chosen. The appointment is not for the parish, but for the town and tithings, and the form of the oath is merely the common form, which is not properly adapted to a case of this sort, unless the word "parish," as there used, may be taken sub modo. The custom thus existing within the parish is peculiar, but is, it is apprehended, perfectly good; and, being so, it follows that *Seaborne* cannot be considered as a churchwarden of Alkington, or of the whole parish; and it is clearly shewn that the township of Berkeley had no interest whatever in the question as to the line of boundary between Leonard Stanley and Alkington, whilst Alkington was of course greatly and separately interested. The township of Berkeley could not be affected by any diminution or increase of Alkington; for, as regards poor-rates, they are perfectly unconnected; and as regards the church-rate, they are equally

so, since the three tithings contribute a certain proportion towards the repairs of the church, without reference to extent or value. In a case such as this, it will be intended that the notice required by 41 *Geo. 3*, c. 109, s. 3, must be given to an officer of the district interested. *Rex v. Nantwich* (a) cited by *Williams, J.*, upon the last argument, is a very strong authority for this position. The whole of the argument *contra* is in fact founded on the use of the word "parishes," without mention of inferior districts. But there are many cases in which the word "parish," occurring in an act of parliament, has been construed as meaning parish, township, or other district. Thus, for instance, it has been distinctly held (b), that the word "parish," as occurring in 43 *Eliz.* c. 2, s. 3, (as to rating parishes in aid,) includes a township. And in many other cases, where in some parts the legislature have mentioned parishes, townships, or places, they have in others used the word *parishes* only, although it is clear that the same things were intended to be designated; e. g. 9 *Geo. 1*, c. 7, s. 1, 2, & 4. [*Little-dale, J.* There is no doubt that the word may be occasionally construed in one sense or the other.] Then the question is, in what sense is it used in this act? The intention must be looked to, and for this purpose the convenience or inconvenience of the various modes of construing the word must be considered. One effect of giving to the word *parishes* its literal meaning only, would be, that in the case of extra-parochial places, no notice at all would be requisite, which would of course be a great inconvenience, for it would defeat in such a case the sole object of the enactment. In *Saunders v. Wakefield* (c) it was held, that the word "agreement," in the latter part of the fourth section of the statute of frauds,

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(a) 16 East, 228.

(c) 4 Barn. &amp; Ald. 595.

(b) *Foley, Sessions Cases*, 25.

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meant "special promise, agreement, contract, or sale," such latter words being found in the early part of the clause. The word "parish" occurring in the latter part of the clause in question, should in like manner be construed to mean "parishes, hamlets, or districts," which are mentioned in the earlier part of the clause.

The argument upon the other points was briefly recapitulated.

*W. J. Alexander and Cripps* contra. The appointment does not shew for what the several churchwardens are appointed; but the difficulty is cleared by the form of the oath, from which it appears that they are appointed for the *parish*. *Saunders v. Wakefield* is no authority for construing the word "parish" as suggested, for in the statute of frauds the word "agreement" was clearly used as a word of reference, whereas in this enactment there is no pretence for so construing it. And besides the mention of churchwardens precludes the idea of the word "parishes" meaning "parishes or other districts," because a churchwarden can only be for a *parish*. The commissioner, in giving the notice to *Seaborne*, has followed the letter of the act, and in so doing has pursued the safest course. The object of *publicity* is probably best attained by the service of the notice upon the churchwarden of the district in which the parish church is; and though it might be considered that it was intended that direct notice should have been given to the district particularly interested, the imperfection of the act left no other safe course open to the commissioner.

The giving of the notice is not to be regarded as a condition precedent to the validity of the adjudication, although it may be so considered for the purposes of an appeal.

With respect to the question as to the form of the

adjudication, and the refusal by the sessions to receive evidence as to matters preceding the adjudication, it is sufficient to observe, that *Rex v. Croke* (a) arose upon a private act of parliament, and that in *Bruyeres v. Halcomb*, the point alluded to was not decided.

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The judgment of the Court was now delivered by

LORD DENMAN, C. J.—The question in this case has arisen out of the ascertainment of boundaries between certain parts of the parish of Berkeley and the parish of Leonard Stanley, in the county of Gloucester, under the third section of 41 *Geo.* 3, c. 109 (b), by a commissioner acting under it, and an act of 11 *Geo.* 4, for the inclosure of the parish of Leonard Stanley; and it seems to us that the difficulty which has arisen is not attributable to any error or misconduct of that commissioner, but to the imperfection and confusion of the General Inclosure Act itself.

It certainly would seem probable that the settlement of boundaries would be equally useful and necessary in the case of an inclosure taking place in a parish adjoining to a parish divided into many districts, as where a parish consists of one undivided district. And accordingly the earlier part of the third section recites, that disputes may arise respecting the boundaries of “parishes, manors, hamlets, or districts,” about to be divided and inclosed, and for preventing or adjusting those disputes, the commissioner, under the powers thereby conferred upon him, is to settle the boundaries. Previously, however, to his executing this duty, he is to give several very formal and public notices, to attract and insure attention to the manner of his performance of it. Subsequently to the commissioner’s settling the boundaries, he is required by the act to give a notice to “one of the churchwardens or

(a) *Supra*, 732.

(b) The General Inclosure Act.

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overseers of the respective parishes," omitting entirely any mention of the officers of *districts*; and out of this omission the question before us has arisen.

In the parish of Berkeley there are four districts called tithings, which districts, according to the statement in the case, have, as far back as memory goes, each nominated a separate churchwarden, who, after his appointment, uniformly acts within and for his own district, "except signing the presentments, made annually to the archdeacon, of the state of the repair of the church, with other presentable matters, which are signed by all the churchwardens." They are also sworn to execute the office of churchwarden "within their parish." An inclosure having taken place within the adjoining parish of Leonard Stanley, the commissioner for settling boundaries had adjusted them between that parish and the adjoining part of the parish of Berkeley, which lay in the tithing of Alkington, and in so doing had fixed certain lands, of which the defendant is occupier, to be in the parish of Leonard Stanley. And the single question is, whether the act of the commissioner was invalid. If it was so, then the lands would remain in Alkington, and the defendant would be properly rated for them, otherwise not.

The sessions properly, as we think, refused to hear evidence as to the giving or the omission of the preliminary notices, and reserved for us the question whether a notice served upon one *Seaborne*, who had been appointed churchwarden for the *tithing* of Berkeley, was a service upon a churchwarden of the *parish* of Berkeley.

It is said that there is no such person as a churchwarden of the parish of Berkeley. If that be said truly, it follows that it was impossible for the commissioner to comply literally with the provisions of the statute; for it has been already noticed, that no officer of a *district* is therein mentioned; and yet it cannot, we presume, be

doubted, but that the case was clearly within the contemplation and objects of the statute. It has been urged, in furtherance of the objection, that the commissioner should have served a notice upon an officer of each tithing, or at least upon that of Alkington. If he had adopted either course, we are by no means sure that he would not have been met by an objection exactly the converse of this—that by law no such officer as churchwarden of a *portion* of a parish can exist.

Placed, therefore, as the commissioner certainly was, in a difficulty, in a case too where he was as certainly meant to act, we think that we should see very clear and convincing reasons for considering his act invalid, before we arrive at that conclusion. And in the result we are not so satisfied. Generally speaking, the churchwarden is peculiarly and emphatically a *parish* officer. The nomination may be, and not unusually is, by a portion of or even by a person in the parish, but the office is not thereby affected; and the officer is still the churchwarden of and for the parish. We think that this may be considered as a somewhat unusual case of separate appointment and separate acting, without affecting the proper and legal character of churchwarden. It may have been an arrangement for some purpose of real or supposed convenience. The churchwardens are sworn in as *for the parish*. The acts, before particularly alluded to, are *for the parish*. The general and undoubted character of the office is *for the parish*.

Upon the whole we are of opinion, that the ascertainment of boundaries by the commissioner was, under these circumstances, well performed, and that the defendant was properly rated in Alkington.

Order of Sessions quashed.

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## The KING v. JOHN JOHNSON.

Expenses incurred by overseers in resisting an appeal against their accounts, cannot be charged to the parish, although such resistance be sanctioned by the vestry.

THE defendant, an inhabitant of the township of Clotton Hoofield, in the county of Chester, appealed against the accounts of the overseers of the poor of that township, which accounts commenced in the year 1833, and ended the 25th March, 1834. This appeal was dismissed, and the accounts were confirmed. At a vestry meeting, held for the purpose of auditing the accounts, Mr. *Johnson* was present, and the only objection which he then made was, that for payment of several of the items no vouchers were produced; the accounts were subsequently allowed by two justices. Under the head of incidental expenses in the accounts, are the following items:—

	£	s.	d.
July 1. Journey to Willington respecting Mr. <i>Johnson's</i> appeal against the overseers' accounts . . .	0	1	6
Paid for stamps and paper . . . . .	0	4	6
6. Paid Mr. <i>Dutton</i> , for attending the Quarter Sessions at Knutsford, supporting the appeal, four days, at 7s. 6d. per day . . . . .	1	10	0
Paid Mr. <i>Witter</i> , for attending the Quarter Sessions at Knutsford, supporting the appeal, four days, at 7s. 6d. per day . . . . .	1	10	0
17. Paid Mr. <i>R. Dutton</i> , for attending the Quarter Sessions to support the appeal against the overseers' accounts, two days . . . . .	0	15	0
Paid <i>Wm. Witter</i> for the same, two days . . . . .	0	15	0
Paid Mr. <i>Hostage</i> for preparing for trial, attending sessions, counsellors, &c. defending the appeal against the overseers' accounts, at the Quarter Sessions in July and October . . . . .	23	11	4

These items were occasioned by a former appeal which Mr. *Johnson* made against the accounts of the overseers for the year 1832, and ending 1833. The first appeal was dismissed, and a case had been granted for the

opinion of the Court of King's Bench, which neither party thought proper to bring up.

In Easter term last, *Chandless* obtained a rule, calling upon the prosecutors to shew cause why the allowance by *W. S.* and *J. T. Esqrs.*, two of His Majesty's justices of the peace for the county of Chester, allowing the accounts of *J. G.* and *W. W.*, overseers of the poor of the township of Clotton Hoofield, in the said county, from the 9th day of April, 1833, to the 25th day of March, 1834, and also an order of sessions made on the appeal of the said defendant against such accounts, and the allowance thereof, on the 13th day of October, 1834, confirming such accounts, should not be severally quashed.

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*W. H. Watson* now shewed cause. According to *Rex v. James (a)*, the Court cannot go into the *merits* of the accounts. The only question, therefore, is, whether the accounts upon the *face* of them are legal. The item which it is supposed will be objected to is, the bill of the former overseers for defending an appeal against their own accounts. The parish having approved of their accounts, it was their duty to defend them. In *Rex v. Gwyer (b)*, *Taunton, J.* laid down a rule as to what an overseer might charge in his accounts, and that rule would seem not to exclude the present item.

Sir *W. W. Follett*, and *Chandless*, contra. It was laid down in *Rex v. Gwyer*, by *Taunton, J.*, that an overseer may charge the expenses of an appeal; but the word *appeal*, as used by Mr. Justice *Taunton*, does not mean an appeal against the overseers' own accounts, but a parish appeal. This appeal was not a proceeding in

(a) 2 Maule & Selw. 321.      4 N. & M. 166; S. C. 2 Ad. &  
(b) 2 N. & M. Mag. Ca. 448;      Ell. 236.

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which the parish had an interest; it was a personal charge against the overseers. There can be no appeal against the overseers' accounts until they are out of office. In *Rex v. Justices of Gloucestershire (a)*, one overseer appealed against the accounts of the other. Surely the expenses of that appeal are not such a charge as the parish ought to be called upon to pay. [Lord DENMAN, C. J. Suppose the expenses incurred by the overseers in defending their accounts, amounted to a very large sum of money, and that a rule was come to by the vestry to indemnify the overseers for those expenses which they had necessarily incurred, and the magistrates, knowing that by the practice of the sessions nominal costs only were given, allowed the accounts?] It was determined, in *Rex v. Gwyer*, that the fact of the vestry having interfered would make no difference.

LORD DENMAN, C. J.—We have suggested the strongest case we could, and even in that case the payment would not be valid. The vestry cannot bind all the inhabitants. The act of parliament throws upon overseers the performance of certain duties, and they can only charge upon the parish those expenses which are necessarily incurred in the performance of *those duties*. An appeal against their own accounts, is a matter personal to themselves, and they cannot be allowed to charge the expenses attending that appeal to the parish.

LITLEDALE, J.—The case which was put by my lord is the strongest that can be imagined. The vestry, however, have no power to alter the law, or to render legal payments that are illegal. The justices have a dis-

(a) 1 Barn. & Adol. 1; and *Eaden v. Titchmarsh*, 3 N. & M. 712; 1 Adol. & El. 691.  
 see *Kirby v. Bannister*, 3 N. & M. 119; 5 Barn. & Adol. 1069;

cretion as to the costs of an appeal against overseers' accounts, and they might obviate any hardships which overseers might sustain by reason of a parish not defending an appeal against their accounts.

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PATTESON, J.—I cannot suppose any possible case in which this item could be considered legal. If I could, I should be inclined to support its validity.

WILLIAMS, J.—I do not know on what supposition we can legalize this payment.

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  4. *A.*, a parish apprentice, having a general permission from *B.*, his master, to seek employment in trade elsewhere, serves *C.*, in the parish of Dale, and resides there forty days before the 1st October, 1816, (when the 56 *Geo. 3*, c. 139, came into operation,) without the knowledge of *B.* *B.*, subsequently to 6th October, assents to such service:—Held, that such subsequent assent to the service with *C.* does not relate back to the commencement of it, so as to make the service in Dale referable to the indenture. So, also, if the act of 56 *Geo. 3*, c. 139, had not passed, *semble.* *Rex v. Inhabitants of Maidstone.* 658
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## ASSAULT.

ness of a carpenter, and do any other work that shall be required by A., who is to pay him certain weekly wages, and also for overwork. The question, whether this agreement constituted a contract of apprenticeship or of hiring and service, ought to be decided by the sessions. But where the sessions, having decided that it is a contract of hiring and service, granted a special case, the Court, upon the facts found as above, reversed their decision, holding that the agreement was an imperfect contract of apprenticeship. *Rex v. Inhabitants of Ightham.* 589

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- Liability of putative Father of Bastard Child, after Marriage of Mother.*
6. By the 4 & 5 Will. 4, c. 76, s. 57, the putative father of a bastard child, born before the passing of the act, whose mother is married to another person, is no longer liable on an order of justices for the maintenance of such child; at least while the husband is of ability to maintain it. *Lang v. Spicer.* 555
  7. *Semble,* the 4 & 5 Will. 4, c. 76, s. 57, operated as a repeal of the 18 Eliz. c. 3, s. 2, and 49 Geo. 3, c. 68. *Ibid.*

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*Bond given by Parochial Officer, continuance of.*

1. A bond given to secure a faithful performance of the office of a collector of parochial rates (who was by act of parliament to be ap-

pointed by trustees for a year, and then to be capable of re-election) was conditioned, that "from time to time, and at all times thereafter, during such time as he should continue in his *said* office, whether by virtue of his *said* appointment, or of any re-appointment thereto, or of any such retainer or employment by or under the authority of the *said* trustees, or their successors, to be elected in the manner directed by the *said* act, he should use his best endeavours to collect the monies received by means of the rates, in the then present or in any subsequent year," &c. &c. :—Held, that the obligation of the bond was not confined to the year for which he was originally appointed, but extended also to all subsequent years in which he was continuously re-appointed. *Augero v. Keen and another, Executors of George Keen, deceased.* 566

2. The subordinate officers appointed under the St. Pancras Vestry Act, 59 *Geo.* 3, c. 39, s. 19, by the select vestry, are not annual officers, but hold their offices during the pleasure of the vestry. Therefore, the bonds given by them to the directors of the poor (who are annual officers), under sect. 57, continue in force after the directors to whom they were given have gone out of office. *M'Gahey v. Alston.* 572

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2. The fact of the arch or bridge

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A stack, of which the lower part consists of cole-seed straw and the upper part of wheat stubble, is not a stack of straw; and the setting it on fire is, therefore, not a capital offence within the stat. 7 & 8 *Geo.* 4, c. 29, s. 17. *Rex v. Tottenham and Cornell.* 422

## CANAL.

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By a local act for making a canal, it is enacted that the rates, tolls, and duties, authorized to be taken by the Company of Proprietors, shall not at any time or times hereafter be charged with, or be subject or liable to, the payment of any parochial rates whatsoever, and that the Company "shall *from time to time* be rated to all parochial rates, for and in respect of the *lands and grounds* to be purchased or taken, and the warehouses and other buildings to be erected or set up by the *said* Company or their successors, in pursuance of this act, in such and the same proportion as, but not at any higher value or improved rent than, *other* lands, grounds, and buildings, lying near or adjacent thereto, *are or shall for the time being be rated*, and as the lands, grounds, warehouses, and

other hereditaments, so to be purchased and taken and erected, would have been rateable, in case the same had *continued in their former state*, and not been used for the purposes of the said navigation or undertaking."

Held, first, that the proprietors of the canal were liable to be rated at the *fluctuating* value of the adjacent lands and buildings, and not at the value which the adjacent lands and buildings possessed at the time when the act was passed.

Secondly, that the value of the adjacent lands was to be estimated from *whatever* source it might arise, and that the increase of value arising from the formation of the canal was not to be excluded from the calculation. *Rex v. Monmouthshire Canal Navigation Company.* 162

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*Jurisdiction of Justices to make an Order for Payment of.*

1. *Seemle*, that justices have in no case jurisdiction, under 53 Geo. 3, c. 127, s. 7, to make an order for the payment of an assessment to a church-rate, the validity of which has at any time been questioned in the Ecclesiastical Court,—although such court had also *decided* in favour of the rate. *Rex v. Sillifant, Esq.* 462
2. Where magistrates are called upon, under 53 Geo. 3, c. 127, to enforce a church-rate, good upon the face of it, it is no ground of objection before them, that the rate was in fact made for the *reimbursement* of the churchwardens. *Ibid.*
3. The Court will not call upon justices to make an order for the payment of a church-rate, when there is any doubt whether the justices have jurisdiction to make such order. *Rex v. Sillifant, Esq.* 462

4. The 14th section of 59 Geo. 3, c. 134, which authorizes churchwardens to borrow money upon the credit of the church-rates, for defraying the expense of repairs to the church, contemplates future expenses only, and not such as have already been incurred. *Rex v. Churchwardens of Dursley.* 594
5. When money is borrowed by churchwardens, under this statute, the instalments of "not less than ten per cent. of the principal sum borrowed" ought to be *annual*.

*Ibid.*

## CHURCHWARDENS.

1. A rule for a mandamus to the archdeacon to administer the oath of office to a churchwarden, is absolute in the first instance, where there is no rival candidate, and no reason assigned for the refusal to administer the oath. *Rex v. The Archdeacon of Litchfield and Coventry.* 201

*When to be sworn in.*

2. Where two sets of persons have each a colourable title to the office of churchwarden, both ought to be sworn in, *admitt.* *The King v. Archdeacon of Middlesex and another.* 312
3. Held, that the ordinary is bound to swear in churchwardens-elect immediately upon their applying to be sworn in, notwithstanding an usage not to swear in until the first visitation after Easter. *Ibid.*

## CONFESSION.

1. A statement made by a prisoner when he is drunk, is receivable in evidence; and, *seemle*, that if a constable gave him liquor to make him so, in the hope of his saying something, that will not render the statement inadmissible, but it will be matter of observation for the

judge in his summing up. *The King v. Spilsbury, Farrall, and others.* 409

2. If a prisoner, during the examination of the witnesses against him before the magistrate, make an observation, parol evidence may be given of such observation, if the magistrate's clerk prove that he only took down the evidence of the witnesses, and the statement of the prisoner after the evidence against him was concluded. *Ibid.*

3. A., being in the custody of a constable, on a charge of felony, was taken by the constable to an inn, where the inn-keeper, in the hearing of the constable, held out an inducement to A. to confess; and A., in the hearing of the constable, made a confession to the inn-keeper, which, at the trial, the constable was called to prove:—*Semble*, that this confession was not receivable in evidence. *The King v. Pountney and another.* 432

4. A magistrate returned, with the depositions taken before him, that the prisoner said—"I decline to say any thing:"—Held, that under these circumstances, a witness for the prosecution could not be allowed to give evidence of the terms of a confession, which, he stated, the prisoner made in the presence of the magistrate, and while under examination. *The King v. Joseph Walter.* 424

### CONVICTION.

1. Where two are convicted of a finable offence, each should be severally fined. *Morgan v. Brown and another.* 509
2. A conviction imposing a joint fine, will not entitle the magistrate to the protection of 24 Geo. 2, c. 44, in an action of trespass for levying the amount. *Ibid.*

See FORCIBLE DETAINER.

### COUNTY RATE.

3. Where an overseer is rendered incompetent to serve, in consequence of a conviction under the 4 & 5 Will. 4, c. 76, s. 97, and an application is made for a mandamus to compel him to deliver up books &c. belonging to the parish, the conviction must be annexed to the affidavits in support of the rule. *The King v. Simms.* 151

### COUNTY RATE.

1. All business relating to the assessment, application and management of the county rate, must be transacted by the justices in *open Court*; but no rate-payer or person not being a member of the Court, is entitled in any way to interfere with the exercise of the jurisdiction of the justices in respect of such assessment, &c. *The King v. The Justices of the Town and County of the Town of Nottingham.* 228
2. Therefore a rate-payer, present at an adjourned sessions held for the purpose of allowing the accounts, &c. to be charged upon the county rate, is not entitled to inspection of such accounts, &c. previously to their allowance. *Ibid.*
3. Although it appear that such accounts, &c. were inspected, examined, and the amounts adjusted at a *private* meeting of justices held previously to such adjourned sessions, and that at such sessions the accounts, &c. were allowed, upon the *total* amounts thereof, and the names of the parties to whom due, being openly *read* in Court. *Ibid.*
4. *Semble*, that a rate-payer is entitled to inspection of such accounts, &c. upon application on a day *subsequent* to the allowance. *Ibid.*

### DECLARATION.

See PLEADING, 2.

## DEPOSITIONS.

It is the duty of the magistrate to return all the depositions taken against a prisoner, and not merely the depositions of those whom he thinks proper to bind over as witnesses. *Rex v. Fuller and Taylor.*  
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## DISTRESS FOR RENT.

The right of the landlord, under the 11 Geo. 2, c. 19, s. 1, to follow the tenant's goods in the case of a fraudulent and clandestine removal, does not attach unless the rent has actually become due before the removal of the goods. *Rand v. Vaughan and Duffield.* 154

## DISTRESS FOR TAXES.

1. A collector of taxes has no right to take a constable or other person with him into the house of a party, of whom he is about to demand the payment of arrears of taxes, and to levy a distress for such arrears, if necessary,—unless he has reasonable ground for apprehending that an assault will be committed on him, or that the distress will be resisted. *The King v. Clarke and another.* 70
2. Where, however, *A.*, a collector, unwarrantably, but without any objection being made, introduces *B.*, a constable, into the house of *D.*, a person from whom he demands taxes, and afterwards, reasonable ground to apprehend violence arising, the collector introduces *C.*, another constable, upon whom *D.* commits an assault; it is no answer to an indictment against *D.* for the assault on *C.* in the execution of his duty, that the collector had wrongfully introduced *B.* *Ibid.*
3. A collector demands taxes due from *D.*, the owner of a house, and

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intimates that, in case of non-payment, he shall distrain; upon which *D.* threatens *A.* with personal violence, but ultimately promises to send the amount on a certain day. This promise not being performed, *A.* goes again to *D.*'s house, and demands the taxes of *D.* *D.* leaves the room in which *A.* is, and fastens the outer door:—Held, that *A.* was justified in unfastening the door and introducing constables. And held, that upon *D.*'s returning into the room, after the introduction of the constables, accompanied with a number of men, and commanding *C.*, one of the constables, whom he knew to be such, to leave the house, it was the duty of *C.* and the other constables to remain.

*Ibid.*

4. A collector of taxes may distrain without having his warrant with him, *semble.* *Ibid.*

## DYING DECLARATION.

On the question, whether a declaration of a deceased person be admissible as a declaration *in articulo mortis*, the judge will consider whether the conduct of the deceased was that of a dying person, such as whether he gave directions respecting his funeral, his will, &c., and not merely the expressions he used, as to whether he thought he should or should not recover. *The King v. Spilsbury and others.* 409

## EJECTMENT.

Parish Property.

See EVIDENCE, 2.

1. Leases by the churchwardens of *A.*, in which the demised tenement is described as parcel of the lands of the parish church of *A.*, and payment of rent to them, are *prima facie* evidence that the tenement is

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parish property. *Doc d. Higgs v. Cockell and wife.* 581

2. Nor does it make any difference that the leases are expressed to be made by the churchwardens, with the consent and approbation of the vicar and the major part of the aldermen and burgesses, and of the inhabitants and parishioners, and that the leases are indorsed with a memorandum, expressing the consent of certain parishioners, whose names are subscribed. *Ibid.*

### EVIDENCE.

See ACCOMPLICE—CONFESSION—  
DYING DECLARATION.

1. If a prisoner's examination before a magistrate conclude "taken and sworn before me," and under that be the magistrate's signature, it is not receivable in evidence; and the judge will neither allow the magistrate's clerk to prove that in fact it was not sworn, nor will he receive parol evidence of what the prisoner said. *The King v. Rivers.* 400
2. Evidence of payment of rent to the churchwardens in respect of premises in the parish, and that leases have been made by the churchwardens, in one of which the property is described as parcel of the lands of the parish church, is *prima facie* evidence that the premises are parish property. *Doc d. Higgs v. Terry.* 385
3. Upon the trial of a question as to the legitimacy of a child procreated during the marriage of A. and B., neither A. nor B. is a competent witness to prove the non-access of A. *Rex v. Inhabitants of Sourton.* 691
4. Nor can their evidence of facts, from which non-access may be inferred, be received for that purpose. *Ibid.*

### FALSE IMPRISONMENT.

1. In trespass for false imprisonment against two magistrates, the defendants gave in evidence a conviction, under 7 & 8 Geo. 4, c. 30, s. 24, of the plaintiff, for "unlawfully and maliciously damaging, &c. a quantity of rushes, for which they adjudged the plaintiff to pay the sum of 10s. as a reasonable compensation, and 6s. 6d. for costs; and, in default of immediate payment, the plaintiff to be imprisoned for one calendar month, unless the said sums should be sooner paid." The warrant of commitment stated the offence to be, that the plaintiff unlawfully trespassed on land in the occupation of D. Thomas, and cut down and carried away a quantity of rushes, for which offence he was ordered to pay the sum of 10s. penalty, and the gaoler was ordered to detain him for the space of one month, or until he should be delivered by the due order of law.—Held, that the conviction sufficiently supported the commitment. *Daniel v. Phillips and Davies.* 112
2. Trespass for assault and false imprisonment, and taking the plaintiff to a police station. Plea: that the defendant was possessed of a dwelling-house, and that the plaintiff entered the dwelling-house, and then and there insulted, abused, and ill-treated the defendant and his servants in the dwelling-house, and greatly disturbed them in the peaceable possession thereof, in breach of the peace; whereupon the defendant requested the plaintiff to cease his disturbance, and to depart from and out of the house, which the plaintiff refused to do, and continued in the house, making the said disturbance and affray therein; that thereupon the defendant, in order to preserve the

peace and restore good order in the house, gave charge of the plaintiff to a certain policeman, and requested the policeman to take the plaintiff into his custody, to be dealt with according to law; and that the policeman, at such request of the defendant, gently laid his hands on the plaintiff, for the cause aforesaid, and took him into custody.

It appeared in evidence that the plaintiff entered the defendant's shop to purchase an article in the shop, when a dispute arose between the plaintiff and the defendant's shopman; that the plaintiff refusing on request to go out of the shop, the shopman endeavoured to turn him out, and an affray ensued between them; that the defendant came into the shop during the affray, which continued for a short time after he came in; that the defendant then requested the plaintiff to leave the shop quietly, but he refusing to do so, the defendant gave him in charge to a policeman, who took him to a station house.

Held, first, that the defendant was justified, under the circumstances, in giving the plaintiff in charge to a policeman, for the purpose of preventing a renewal of the affray.

Held, secondly, that the plea was not substantially proved, inasmuch as the alleged assault on the defendant himself was not proved.  
*Timothy v. Simpson.* 127

## FINES AND AMERCEMENTS.

1. A fine of 300*l.*, for not serving an office, is excessive, where the highest previous fine was 100*l.*, and was found sufficient to produce an acceptance of the office. *Rex v. Sir Oswald Mosley.* 257

2. So, although since the last refusal the office has become more burdensome, and the number of persons qualified to serve has much diminished. *Ibid.*

## FORCIBLE DETAINER.

1. To a writ of certiorari the justices returned a conviction of one *A. B.* for a forcible detainer, together with an inquisition, upon a traverse by *A. B.* of the force, &c., taken a few days subsequently to the date of the conviction, which found an unlawful entry and forcible detainer by *A. B.*,—and an award of restitution indorsed upon the inquisition. The conviction having been quashed for insufficiency, it was held that the inquisition must be quashed also, and that the Court is bound to grant re-restitution, without entering into any inquiry as to the title of the respective parties. *The King v. Wilson.* 719
2. Held also, that an inquisition finding a party guilty of an unlawful entry and forcible detainer, upon the face of which it does not appear that a complaint had been made, or by what authority or for what purpose the jury had been summoned, is defective. *Ibid.*
3. A conviction for a forcible detainer, under 8 *Hen. 6*, c. 9, must shew an *unlawful entry* as well as a forcible detainer. *The King v. Wilson.* 233
4. And therefore a conviction for a forcible detainer, which states an information and complaint of an unlawful ejection and forcible detainer, but in which the justices profess to convict solely upon their own view of the forcible detainer, is bad. *Ibid.*
5. Justices cannot convict of a forcible detainer upon their *own view* of the detainer, without evidence  
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that the entry was unlawful. *The King v. Wilson.* 233

### GAME.

See APPREHENSION—INFORMATION—  
NIGHT POACHING—WOUNDING, 1.

### HIGHWAYS.

See JUSTICES, 1—ROADS.

1. A charter, granted by Queen *Eliz.* and confirmed by *Charles 1*, exempting the tenants of certain ancient demesne lands from the payment of road money (*chimagium*), does not operate to exempt them from the performance of *statute duty* on the highways, pursuant to 13 *Geo. 3*, c. 78, 34 *Geo. 3*, c. 64, 44 *Geo. 3*, c. 54, and 54 *Geo. 3*, c. 109. *The King v. Siciter.* 206
2. In a cognizance for a highway-rate, made for the purposes mentioned in the 30th and 45th sects. of 13 *Geo. 3*, c. 78, such rate must be expressly alleged to be an equal assessment of 9d. in the pound on the yearly value of the lands, &c. The statement of its being an equal assessment of 9d. in the pound upon all occupiers of lands, &c. within the parish, is not sufficient. *Morell v. Harrey.* 506
3. On an indictment against a parish for non-repair of a highway, a plea of guilty to a former indictment against the same parish for non-repair of the same highway, is conclusive evidence that it is a public way. *The King v. Witney.* 417
4. Evidence that a parish did not put guard fences at the side of a road, is not receivable on an indictment which charges that the king's subjects could not pass as "they were wont to do," if no such fences existed before. *Ibid.*
5. *Seemle*, that an arch of nine feet span, without battlements at either

end, over a stream usually about three feet deep, is a culvert, and not a bridge, to be repaired by the county; and if the parish have pleaded guilty to a former indictment, which described it as a part of the road, they are concluded by having so done. *Ibid.*

#### *How to be described in Indictment for obstructing.*

6. A public footway leading from A. to the gate of a church-yard, and communicating through that gate, by a public path through the church-yard, with the church, may be described in an indictment as a footway leading from A. towards and unto the church. *The King v. Marchioness of Downshire.* 463
7. So, although part of the path across the church-yard is ancient, and part has been recently dedicated to the public. *Ibid.*
8. So, although the path, instead of leading directly from the gate to the church, forms an acute angle in one part of it. *Ibid.*

#### *Jurisdiction of Justices as to stopping up.*

9. Justices cannot make an order for stopping up part of a highway, as unnecessary, under 55 *Geo. 3*, c. 68, s. 2, unless they have viewed the highway together; nor, unless the finding that it is unnecessary be the result of that view. *The King v. Justices of Cambridgeshire.* 336
10. But it is no objection that previously to the view the road had been stopped up *de facto* by the owner of the adjoining land, without legal authority. *Ibid.*
11. The view is sufficiently stated upon the face of the order in these terms,—“We &c. having upon view found, &c.” *Ibid.*
12. It is no objection to such order,

## HOUSE-BREAKING.

that in the part of it which directs that the soil of the road to be stopped up shall be sold to the owner of the adjoining land, if he be willing to purchase, or to some other person, that the words "for the full value thereof," occur only at the end, and not also after the part which directs a sale to the owner of the adjoining land, if willing. *The King v. Justices of Cambridgeshire.* 336

13. Nor, that it does not contain any direction as to the application of the money arising from the sale.

*Ibid.*

14. Nor, that no certificate of a sale is written by the justices at the foot of the order. *Ibid.*

15. Nor, that the owner of the land adjoining to the road stopped up was himself, at the time of making the order, waywarden of the parish in which the road is situate.

*Ibid.*

16. Nor, that the road has become unnecessary by reason only of the *substitution*, by the owner of the adjoining land, of another road over his own land, and the adoption by the public of such substituted road. *Ibid.*

17. *Semble*, that upon motion for a certiorari to bring up an order of sessions confirming an order of justices for stopping up a highway, the Court cannot entertain objections to the validity of the order, whether on the ground of *want of jurisdiction* or otherwise, unless such objections arise upon the face of the order itself. *Ibid.*

## HOUSE-BREAKING.

### *Principal and Accessary.*

1. A room-door was latched, and one person lifted the latch and entered the room, and concealed

## INFORMATION. 761

himself for the purpose of committing a robbery there, which he afterwards accomplished. Two other persons were present with him at the time he lifted the latch, for the purpose of assisting him to enter, and screened him from observation by opening an umbrella. It was held, that the two were in law parties to the breaking and entering, and were answerable for the robbery which took place afterwards, though they were not near the spot at the time when it was perpetrated. *Rex v. Jordan, Sullivan, Mott, and Seale.* 443

2. In burglary, where the breaking is one night, and the entry the night after, a person present at the breaking, though not present at the entering, is in law guilty of the whole offence. *Ibid.*

## INDENTURE.

See APPRENTICESHIP—SETTLEMENT BY APPRENTICESHIP.

## INFORMATION.

Where, in an action on the case against a party for maliciously, and without probable cause, causing an information to be laid against the plaintiff for trespassing on land in pursuit of game, in the day time, under stat. 1 & 2 Will. 4, c. 32, and thereby causing him to be convicted and imprisoned by a justice of the peace, the plaintiff did not appeal against the conviction, pursuant to the 44th sect. of that statute, but suffered the imprisonment under the conviction, and the conviction was still subsisting:—Held, that the action was not maintainable; and the plaintiff having been nonsuited, the Court refused to set it aside. *Mellor v. Baddeley and another.* 137

## JUSTICES.

See *ROADS*, 5.

*Surveyors of Highways' Accounts.*

1. The justices at petty sessions have no original jurisdiction to allow the accounts of waywardens or surveyors of highways. *The King v. The Justices of Cumberland.* 451

Nor is such want of jurisdiction cured by the acquiescence of the waywardens and of the vestry.

*Ibid.*

2. The Court will not grant a mandamus to justices of Middlesex, commanding them to issue distress-warrants for levying paving rates made in any district within the metropolis, but will leave the commissioners, (or other persons having the control of the pavements of the district,) to their remedy by action under 57 Geo. 3, c. xxix, s. 38. *The King v. The Justices of Middlesex.* 202

The 57 Geo. 3, c. xxix, s. 38, applies as well to those districts within the metropolis, the paving commissioners of which have already, by a local act, a limited power of bringing actions for the recovery of rates, as to other districts. *Ibid.*

3. By a local act for paving, &c. the town of Stafford, certain commissioners were authorized to make rates for the purposes of the act, and if any person thought himself aggrieved by the rate, an appeal was given to the commissioners, and from their determination to the sessions; and it was enacted, that in case any person rated should neglect to pay his rate for seven days after demand, it should be lawful for any justice, upon proof on oath of such demand and non-payment, by warrant to authorize the collector to levy the rate by distress and sale of the goods of

the person rated; and in case there should be no distress, to commit the party to gaol:—Held, that the clause was not obligatory on the justice to issue a warrant, without a previous summons. *The King v. The Justices of the Borough of Stafford.* 191

4. *Semble*, that in all cases in which magistrates are authorized, upon application, to issue a distress-warrant for non-payment of any rate, although they have no power to relieve, it is their duty first to call the party before them by summons;—unless by act of parliament it be specially directed that the warrant shall be issued immediately. *Ibid.*

*Action against Justices—Suggestion for double Costs.*

5. A justice of the peace is not entitled to have a suggestion entered on the roll, that the action was brought against him for an act done by him as a justice of the peace, in order to obtain double costs. *Fosbrooke v. Holt.* 563
6. *Semble*, That a justice of the peace is entitled to double costs on discontinuance before trial, under 1 Jac. 1, c. 5. *Ibid.*

*Power to commit on Default of Payment, under 5 Geo. 4, c. 18.*

7. The provisions of 5 Geo. 4, c. 18, empowering magistrates to commit on default of payment, apply only to cases of penalties and forfeitures. *Wiles v. Cooper and others.* 265
8. Therefore magistrates have no power under that statute to commit a party to prison for the non-payment of a sum of money adjudged by them, under 20 Geo. 2, c. 19, 31 Geo. 2, c. 11, and 4 Geo. 4, c. 34, to be due as wages. *Ibid.*
9. In an information before magis-

trates under 20 *Geo. 2*, c. 19, 31 *Geo. 2*, c. 11, and 4 *Geo. 4*, c. 31, for non-payment of wages, it should appear that the relation of master and servant, in one of the occupations therein specified, existed between the debtor and the informant. *Wiles v. Cooper and others.*

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*Jurisdiction in respect of Accounts of Churchwardens, &c.*

10. The adjudication of magistrates, under 50 *Geo. 3*, c. 49, s. 1, upon the accounts of churchwardens and overseers, rendered by them at the expiration of their office, is in the nature of an award, and cannot be re-opened by those magistrates for the purpose of correcting a supposed mistake in the settlement of accounts. *Barrons v. Luscombe and others.*

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11. In case of a mistake, an appeal lies to the sessions. *Ibid.*

12. Where magistrates are empowered to settle and allow the accounts of a public officer, and in case of a neglect or refusal by such officer, for fourteen days after the allowance, to pay over the balance found to be due from him, are directed, upon application of the parties interested, to issue a distress-warrant for such balance; they cannot, after issuing a warrant in conformity with the power given to them, but before execution of it, order that such execution be suspended, on the ground of an error in the settlement of the accounts,—unless the parties interested consent to such suspension. *Ibid.*

13. Thus in the case of a warrant under 50 *Geo. 3*, c. 49, for the balance adjudged by magistrates to be due from churchwardens and overseers at the expiration of their office. *Ibid.*

14. *Dubitatur*, whether the order

might not be suspended, on the ground that it had since appeared to the magistrates that there had been no neglect or refusal to pay for fourteen days after the allowance. *Ibid.*

15. *Semble*, that if the distress-warrant were a nullity, the magistrates might suspend it. *Ibid.*

16. Whether magistrates have, in ordinary cases, power to suspend the execution of a warrant duly issued by them, where no party is specially interested in the execution of such warrant, *quære.* *Ibid.*

17. Where magistrates, without authority, order the suspension of the execution of a distress-warrant duly issued, and the officer afterwards executes such warrant, he is entitled, before action brought for the taking under such warrant, to a demand of a copy and the perusal of the warrant, under 24 *Geo. 2*, c. 44. *Ibid.*

LEASES.

See EJECTMENT.

LUNATIC.

*Order of Maintenance.*

1. The 9 *Geo. 4*, c. 40, s. 38, does not authorize a *retrospective* order for the maintenance of a lunatic. *The King v. The Inhabitants of St. Nicholas, Leicester.* 60

2. An order under that act, stating that the party (who was not settled in the parish in which he was found), was so far disordered in his senses that it was dangerous for him to be permitted to go abroad, and that the justices have adjudged that his settlement is in a particular parish, was held sufficient, although the form given in the schedule to the act was not pursued, and the order contained

no words of present adjudication. *The King v. The Inhabitants of St. Nicholas, Leicester.* 60

## MANDAMUS.

See CHURCHWARDEN—PARISH CLERK  
1—POOR RATE, 2—RATES, 9, 10,  
11—SESSIONS, 2—VESTRY, 3.

1. To a mandamus requiring *A.*, a waywarden, to deliver to the churchwardens certain books of account, assessments, &c. in his custody, power, or possession, it is a good return to say, that on and since the teste of the writ, *A.* had not nor has had the books, &c. or any of them, in his custody, possession, or power. *The King v. Round.* 307
2. If *A.* goes on unnecessarily to state that he had them not on a prior day, when it is surmised in the mandamus that they were demanded by the churchwardens, he is not bound to negative a possession intermediate between the demand and the teste of the writ. *Ibid.*
3. Whether, under the circumstances, the books, &c. were in the power of *A.*, is a question to be raised by a traverse to the return, or by an action for a false return. *Ibid.*

## NIGHT POACHING.

1. On an indictment for night poaching by four, one being armed, *semble*, that if two enter the land laid in the indictment, and the other two remain outside the preserve, but are of the same party, and are there for the same purpose, all ought to be found guilty. *The King v. Lockett.* 430
2. A person who is employed by a lord of a manor as a watcher of his game preserves, is a person having authority to apprehend night poachers, and he need not

## NIGHT POACHING.

have any written authority from the lord of the manor. *The King v. Price.* 401

3. Where a person is found night poaching on the manor of *A.*, by one of his watchers, and is pursued off the manor, and then on to it again, and there snaps his gun at the watcher, he is guilty of a capital offence, under the stat. 9 Geo. 4, c. 31, ss. 11 & 12. *Ibid.*
4. The servant of the owner of a wood attempted to apprehend a poacher, whom he found there at eight o'clock on the morning of the 17th of December, and the poacher shot at him:—Held, that this was not a capital offence within the stat. 9 Geo. 4, c. 31, ss. 11 & 12, as there was no proof that the poacher was in pursuit of game an hour before sunrise. *The King v. Tomlinson.* 405
5. The 9th sect. of the stat. 9 Geo. 4, c. 69, which relates to night poaching, creates two distinct offences: First, the *entering* in the night on land, to the number of three, some one of them being armed; and, second, the *being* in the night on land to the number of three, some one of them being armed.  
The form of indictment for night poaching given in Jerv. Arch. is good. *The King v. Kendrick and others.* 406
6. Whether the preferring of an indictment against a party for night poaching, which is ignored, is a commencement of the prosecution, within sect. 4 of the stat. 9 Geo. 4, c. 69, so as to warrant the conviction of the party on another indictment preferred four years after the offence, *quære.* *The King v. Killminster.* 413
7. To sustain an indictment for night poaching, armed &c. the parties must have been in the place charged in the indictment with intent to

## NOTICE OF ACTION.

destroy game, &c. *there*, and it is incumbent on the prosecutor to convince the jury that the defendants had an intent to destroy game, &c. in the particular place mentioned in the indictment. *The King v. William Gainer and John Gainer.*

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8. *Semble*, that in case of night poaching, all who are at the place, each acting his part with a common intent, are equally guilty, although some only are bodily upon the land:—Held, that those who are watching at the outside of a preserve for the purpose of giving the alarm on the approach of the game-keeper, to others who are in the preserve, and who afterwards go into the preserve for that purpose, are equally guilty with those who enter the preserve at first. *The King v. Passey, Meadows, and others.*

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## NOTICE OF ACTION.

1. A notice of action to justices, under the 24 Geo. 2, c. 44, s. 1, is sufficient, which is indorsed with the name and *place of business* of the attorney, although he actually resides elsewhere. *Roberts v. Williams and another.*
2. If *A.*, having no right to apprehend *B.*, direct a police officer to take *B.*, and he do so, *B.* may maintain an action for false imprisonment against *A.*; but if *A.* merely make a statement to the officer, leaving it to him to act or not as he thinks proper, and the officer then take *A.*, *B.*'s remedy against *A.* is (if any) by action on the case. *Hopkins v. Crowe.*

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If a person who has ill-treated a horse be apprehended by one who is neither the owner of the horse nor a peace officer, the person so apprehending is not entitled to no-

## PARISH CLERK. 765

tice of action under the 19th sect. of the stat. 5 & 6 Will. 4, c. 59. *Ibid.*

3. If, under that stat. s. 9, a peace officer be required by another person to take a third person into custody for cruelty to a horse, not committed in the officer's own view, the officer, before taking the party into custody, should either inquire into all the particulars, or should see the animal, so as to form a judgment as to what has occurred. *Ibid.*

## OVERSEERS.

1. Expenses incurred by overseers in resisting an appeal against their accounts, cannot be charged to the parish, although such resistance be sanctioned by the vestry. *The King v. Johnson.*
2. An overseer is not bound to take precautionary measures against the small-pox by causing the poor to be vaccinated. And even if the overseer has, by the direction of the vestry, agreed that the poor shall be vaccinated at the expense of the parish, and refuses to fulfil that agreement, the Court will not grant a criminal information against him; although, in consequence of his conduct, the infection of the small-pox has spread and many of the poor have died. *Anonymous.*

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See PLEADING.

## PARISH CLERK.

*Amotion of.*

1. Where a vicar, after summons to the parish clerk to attend and answer a charge of intoxication, amoves him upon insufficient *evidence* of the intoxication, the Court will issue a mandamus to the vicar, requiring him to restore the clerk. *Rex v. Neale, clerk.*
2. *Quære*, whether it would be a suf-

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ficient ground to amove a clerk, that amongst his neighbours he was notorious as a drunkard,—without proof of particular acts of intoxication and indecorum. *Rex v. Neale, clerk.* 108

3. If one act of intoxication be relied on, the intoxication and consequent incapacity to perform the duties of his office, when required to do so, should, at all events, be distinctly proved. *Ibid.*

### PARISH PROPERTY.

See EJECTMENT.

### PLEADING.

See FALSE IMPRISONMENT, 2.

1. To trespass for an assault and false imprisonment, the defendant pleaded that he was in lawful possession of a house, and that the plaintiff was unlawfully therein, and had been requested to depart, but had refused, whereupon the defendant gently laid his hands on him to remove him; that thereupon the plaintiff assaulted him in the presence of a policeman, wherefore he caused him to be taken to a police office. Replication, de injuriâ. The defendant proved all the matters of the plea, except the assault by the plaintiff:—Held, that the plaintiff was entitled to recover damages for the imprisonment.—*Reece v. Taylor and another.* 35

*Who entitled to Inspection of Poor-Rates.*

2. In a declaration against an overseer, &c. for the penalty imposed by 17 Geo. 2, c. 3, for refusing inspection of a poor-rate, it is sufficient for the plaintiff to describe himself as an inhabitant of the parish, without stating that he is a rated inhabitant. *Batchelor v. Hodges.* 520

3. In such a declaration against an assistant overseer, it is sufficient to charge that the defendant had the rate in his possession as such assistant overseer, without expressly stating that the defendant was such an assistant overseer as made it his duty to produce it, *semble.* *Ibid.*
4. At all events, the omission of such statement could only be taken advantage of on special demurrer. *Ibid.*
5. To such a declaration it is no plea that the rate, at the time of the demand of inspection, was not a subsisting rate. *Ibid.*
6. Still less that it was an old rate unappealed against, and the time for appealing against which had expired. *Ibid.*

### POOR.

See POOR RATE—RATES—REMOVAL OF PAUPERS—SETTLEMENT.

1. Where premises in the parish of A. are taken by the overseers of B., and used by them in the employment of the poor of B., such overseers are ratable to the relief of the poor of A. *The Governors of the Poor of Bristol v. Wait and others.* 620
2. The unprofitableness of an occupation of premises does not exempt from ratability to the relief of the poor. *Ibid.*
3. *Quære*, whether an objection to a poor-rate upon an occupier, on the ground that the character of the occupation exempts from ratability, is the subject of appeal only, or may be raised in an action of trespass or replevin. *Ibid.*
4. Under 79th section of the Poor Law Amendment Act, notice of appeal against an order of removal need not be given within twenty-one days from the time of sending the notice of chargeability and the

- copies of the order and examination to the overseers of the parish charged by such order. *The King v. The Justices of Suffolk.* 316
5. Held, that the practices as to notices of appeal not being expressly altered by the act, remains as before, although, by sect. 81, the statement of the grounds of appeal is required to be delivered with such notice, or at least fourteen days before the sessions; and therefore where, by the practice of the sessions, eight days' notice only is required, a notice of appeal, given eight days before the sessions, is sufficient, provided such statement of the grounds of appeal be delivered fourteen days before the sessions; at least where the delivery of such statement is accompanied with the service of a notice of appeal de facto, although such notice be erroneous, as purporting to be given for the borough, instead of the county sessions.

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*Removal of Irish Poor.*

6. The English-born and unemancipated daughter of Irish parents residing in England, but not having done any act to gain a settlement, cannot, upon becoming actually chargeable, be removed to the place of her birth. *Rex v. Inhabitants of Mile End Old Town.* 453
7. But in such case the parents, together with all such of their children as have not acquired a settlement in their own right, may be passed to Ireland under 3 & 4 W. 4, c. 40. *Ibid.*
8. Where the daughter of an Irish pauper is removed with her father to Ireland under 3 & 4 W. 4, c. 40, her bastard child born in England cannot be removed with her, although within the age of nurture. *Ibid.*

*Relief to Child, where it renders Father chargeable.*

9. Relief given to a child of Irish parents about sixteen years of age, but residing with his father's family, renders the father actually chargeable within 3 & 4 W. 4, c. 40, notwithstanding s. 56 of the Poor Laws Amendment Act, (4 & 5 W. 4, c. 76). *Ibid.*
10. The latter act was held not to apply to Irish and Scotch paupers. *Ibid.*
11. Whether relief to a child of English parents above sixteen, but residing with his father, given since the passing of the Poor Laws Amendment Act, renders the father chargeable, *quære.* *Ibid.*

POOR-RATE.

See CANAL—POOR—PLEADING, 2—RATES.

1. On the 15th of August, 1828, an increased poor-rate was assessed on certain premises, against which an appeal was entered at the October sessions, and respited to the following sessions in January. On the 15th of December, 1828, the overseers distrained for the increased rate; but, to prevent a sale, the amount was paid under protest, and the distress relinquished. The rate was subsequently reduced, in consequence of the decision of the Court of King's Bench, on a case sent up by the justices on the hearing of the appeal. It did not appear that any notice in writing of the appeal had been given to the overseers, pursuant to the 41 G. 3, (U.K.) c. 23, s. 2, before the levy. In an action brought by the party on whom the increased rate was made against the defendant, one of the overseers at the time of the levy, to recover back the excess above the last ef-

fective rate, as money had and received to his use :—Held, that as no notice of appeal had been given to the overseers, pursuant to the second section of the statute, the action could not be maintained.

*Priestley v. Watson.* 141

2. This Court will not issue a mandamus to compel magistrates to issue a distress-warrant to enforce the payment of poor-rates, where it is doubtful whether the warrant would be legal, and the rates are recoverable by another mode of proceeding. *Rex v. Hall and Dyer.*

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*Exemption under Local Act.*

3. It is not necessary, in order to create a statutory exemption from poor rates, that the act should in express terms exempt from such particular rates ; but it is sufficient if, by fair construction of the words of the act, the exemption clearly appears. *Rex v. The Inhabitants of Barnby Dun.* 10

4. Therefore, where in a local act, (by which a company are empowered to make the river D. navigable and to make new cuts through the adjoining lands) it is enacted that the company "shall not be taxed or assessed for the navigation or the profits thereof at any place except the towns of A. and B." where account books are directed to be kept ; the Court held that an exemption from poor-rates, in respect of lands taken for the purpose of the act elsewhere than in A. or B., was created ; and this although no part of the navigation is within the town of A.

*Ibid.*

5. And by a subsequent local act, after reciting that it would be advantageous to abandon the existing navigation in certain parts, and to make new cuts in lieu thereof,

and empowering the company to make certain new cuts and to receive additional tolls in consequence thereof, it was enacted, that the cuts should, when made, be considered and taken as part of the navigation of the river D.; and that all provisoes, directions, restrictions, penalties, and forfeitures, in the former acts, respecting the boatmen employed on the said river, the owners, commanders, &c. of boats, &c. or other persons employed thereon, or passing the locks of the said river, or making obstructions thereon, or in any other respect relating to or for the benefit or protection of the said navigation, and all other powers and authorities therein contained, should extend and be applicable to the said cuts, &c. as fully in every respect as if the said cuts, &c. had originally been part of the river D. navigation, and had been inserted in the several acts :—Held, that the company were exempted from poor-rates in respect of land not in A. or B. taken by them under the powers of this act, and used for cuts in lieu of part of the old navigation. *Ibid.*

6. The words "shall when made be considered and taken as part of the navigation of the river D.," are alone sufficient to extend to the new cuts the exemption from assessment which had previously existed in respect of the navigation generally. *Ibid.*

*Liability in respect of.*

8. Where by a local act for the government of a parish, collectors of the rents of houses, &c. within the parish, "the yearly assessment or valuation whereof respectively shall be less than 30*l*." are made liable to be rated, and compellable to pay the rates in respect of such

## PRACTICE.

houses, &c.; *Seemle*, that the liability of the collector extends only to cases in which the real and not the assessed value of the houses respectively, &c. is under 30*l*. *Rex v. Hall and Dyer, Esquires.* 546

### PRACTICE IN CRIMINAL CASES.

1. *A.* was to be tried for felony at the assizes for the county of *W.*, and *B.*, a material witness for *A.*, was committed to the *W.* city prison for further examination, on a charge of felony:—Held, that before the trial of *A.*, the governor of the *W.* city prison ought to allow *A.*'s attorney to see *B.* in his presence. *Rex v. Sarah Simmonds.* 399

#### *Delivery of Particulars of Offence charged in Indictment.*

2. The Court ordered the prosecutor of an indictment for a nuisance to give the defendant a note of the nuisances intended to be proved. *Rex v. Curwood and others.* 293
3. A rule for this purpose may be granted without affidavit, upon reading the indictment only. *Ibid.*

#### *Property taken from accused Persons.*

4. A police officer who apprehended a person on a charge of rape, took from him a watch and other articles. The judges of the Court at which he was indicted, on motion supported by affidavit, directed the property to be given up to the prisoner, saying that it ought not to have been taken from him. *Rex v. William Kinsey.* 450
5. A constable who apprehends a prisoner, has no right to take away from him any money which he has about him, unless it is in some way connected with the offence with

## QUO WARRANTO. 769

which he is charged, as he thereby deprives him of the means of making his defence. *Rex v. O'Donnell.* 397

*And see* CONFESSION—DEPOSITIONS.

### PRINCIPAL AND ACCESSORY.

*See* HOUSE BREAKING—NIGHT POACHING, 8.

### QUO WARRANTO.

By a local act, the inhabitants of an incorporated district are directed to elect governors and directors of the poor,—who are authorized to make orders and regulations respecting the poor and the poor-rates,—are to make out a list of sixteen inhabitants or occupiers, from which list justices at a petty session are to elect four to be overseers of the poor,—are empowered to appoint watchmen and beadles, (who are to be sworn in as constables, and act as such whilst in execution of the powers of this act, and who, together with the constables duly appointed, are to be under the direction and control of the governors and directors,) clerks, collectors, treasurers, inspectors, assistant overseers, and all such other officers as they may think fit,—to dismiss them, and pay them such salaries as they may think proper,—are to ascertain and settle the sum to be assessed for parochial purposes, (for which sum poor-rates are to be made by the inhabitants,)—are to have vested in them all houses, &c. used for the accommodation of the poor, and of the watchmen and beadles, and all other property purchased for those purposes, and are to sue and be sued, and to prosecute by indictment or information:—Held, that the office of

governor and director is not such an office that an information in the nature of a quo warranto will lie for an usurpation of it. *Rex v. Ramsden and others.* 275

### RAILWAY ACTS.

Effect of clause in railway acts for incorporating the provisions of another act. *The Sirhowy Tram-road Company v. J. Jones and others.* *W. Homfray v. Jones.* 185

### RATES.

See HIGHWAYS, 2—POOR RATE—SEWERS' RATE.

1. The Court cannot compel the officers of a parish to permit the rate-payers of the parish to take copies of or extracts from a book containing all parochial rates and accounts of all moneys received for parochial purposes, but not containing any account of parochial disbursements, kept under the directions of a local act. So although the parish have adopted the provisions of 2 Will. 4, c. 60, (the Vestry Act.) *Rex v. Vestrymen and Vestry Clerk of St. Mary-le-Bone.* 712
2. A corn rent given by an act for inclosing lands, and extinguishing tithes to the rector in lieu of tithes, is ratable to the relief of the poor, unless there be an express clause of exemption. *Rex v. Inhabitants of Wistow.* 682
3. Where therefore a commissioner appointed under such an act is directed to ascertain the yearly value of all the tithes, moduses &c., and in making such valuation, the tithes of all lands are "to be deemed equal in value to one-fifth part of the annual net value of such lands," and a corn rent equal to the value of the tithes is to be

### RATES

settled and charged in due proportions upon the lands, and to be payable to the rector by the occupiers of the lands,—the rector is liable to be rated in respect of such corn rent. *Ibid.*

4. An incorporeal hereditament cannot be made ratable to the relief of the poor, by virtue of a local act of parliament, except by clear and express words. *Colebrook v. Tickell and Walker.* 637
5. By a local act, the rector, churchwardens, overseers, and vestrymen of a parish, are authorized to make three distinct rates upon all persons who shall inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, or other building, tenement, or hereditament, that is to say, one rate for the relief of the poor, another for the repair of the church, and another for cleansing and lighting the streets, and repairing the highways of the parish,—such last-mentioned rate to be a pound rate upon the annual rent or value of all messuages, lands, tenements, and hereditaments, as should be held or occupied within the parish:—Held, that the word "hereditament," as used in the former as well as the latter part of the enactment, means such hereditaments only as are the subject of actual corporeal occupation, and that therefore no incorporeal hereditament is thereby made ratable. *Ibid.*
6. A river navigation company is to contribute to the relief of the poor in a parish through which a portion of the navigable river passes, in proportion to the profit resulting from that portion; such profit is to be calculated at the amount of rent which a tenant would pay. *Rex v. Inhabitants of Woking.* 295
7. When therefore the company receive the tolls to their own use,

the amount of the repairs, and of the expenses necessary to the carrying on of the undertaking, and also a per centage equal to a reasonable tenant-profit, must be deducted from the gross receipts in fixing the ratable value. *Rex v. Inhabitants of Woking.* 295

8. But no deduction is to be made in respect of burthens imposed upon the profits of the navigation, or in respect of compensation payable to the owners of property injured by the navigation. *Ibid.*
9. The want of certainty in the specification of some of the property included in a poor rate, is no ground for refusing a mandamus to justices to issue warrants of distress for levying the amount of a particular assessment. The defect is ground of appeal only. *The King v. Matthew Wilson and John Nicholas Coulthurst, Esqrs. Justices of the West Riding of Yorkshire.* 215
10. It is no ground of discharging a rule nisi for a mandamus to justices to enforce a poor-rate which the party rated has refused to pay, and for which the justices have refused to issue a warrant of distress, that since the granting of the rule a third party has tendered the amount of the assessment to the overseer. *Ibid.*
11. But it is an answer to such an application, that at the meeting of justices when the warrant was demanded, the overseer came under a promise to prove that the occupation of the party rated was beneficial, and failed to do so, whereupon the justices decided against the rate,—although it was not necessary, in point of law, that the occupation should have been beneficial. *Ibid.*
12. The overseer ought to have gone again, and, after saying that the

occupation need not be beneficial, have demanded a warrant. *Ibid.*

### REMOVAL OF PAUPERS.

1. By an order, unappealed against, a pauper is removed from A. to the parish of B. in the county of S.—B. at that time consists of two townships, C. and D., (jointly maintaining their own poor) in the county of S., and one township, E., (separately maintaining its own poor,) in the county of W.

This order is conclusive upon that part of B. which lies in the county of S., *semble.* *Rex v. Inhabitants of Oldbury.* 375

2. After the removal, C. and D., being required by mandamus so to do, elect separate overseers and maintain their poor separately. The same pauper is afterwards removed from A. to the township of C. C. is not estopped by the former removal. *Ibid.*

### RENT.

See DISTRESS FOR RENT.

### ROADS.

See HIGHWAYS.

1. Where, by an act of parliament, trustees are authorized to make a main line of road from one point to another, and a portion only of the road is completed, the district through which the part completed is situate, is not bound to repair it, although made by the trustees, and used by the public, and repaired by the district, for upwards of thirty years, and although it be of great utility to the public. *Rex v. Inhabitants of Edge Lane.* 527
2. Nor does it make any difference that the line of road has been in some measure varied by subsequent acts of parliament, and the

completed parts made the subject of distinct enactments with respect to repairs and tolls to be done and taken by the trustees; the object of all the acts being to make a communication between the same districts. *Rex v. Inhabitants of Edge Lane.* 527

*Inclosure Act.*

3. An act for inclosing lands in the parish of A., authorized commissioners to make new roads, and also to direct, turn, alter, or stop up any of the present public roads, as they should think proper;—directed them to prepare and sign a map describing the roads, and to give certain notices therein prescribed, and to hold a meeting for the purpose of hearing objections, in which they were to be assisted by a justice of the peace,—the said commissioners and justice to have power to confirm and alter the map;—and all roads not set out, or finally ordered or directed to be set out and continued, were to be for ever stopped up and extinguished, and deemed and taken to be part of the lands to be divided and allotted: Provided, that no roads passing through *old inclosures* should be stopped up, diverted, turned, or altered, without an order of two justices:—Held, that a road passing partly through old inclosures and partly over lands to be inclosed, was not, nor was any part of it extinguished by reason of its not being mentioned or set out in the map or award, and of the latter part of it being included within a private allotment. *Rex v. Marquess of Downshire.* 539
4. By an order of justices it was stated, that three justices *having particularly viewed* the public roads within the parish of A., therein-

after described, *and being satisfied* that they were unnecessary to be continued, did order that such roads should be stopped up and extinguished:—Held, that this order was invalid, inasmuch as it did not appear upon the face of it that the justices were, *upon the view*, satisfied that the roads were unnecessary. *Ibid.*

5. The Court will make the same intendment in favour of an order of justices as in favour of a conviction. *Ibid.*

SESSIONS.

See SETTLEMENT, 34, 35, 36, 37, 38.

1. Upon the trial of an indictment at the quarter sessions, that Court is the sole judge of the propriety of the entry of the verdict. *The King v. The Justices of Suffolk.* 221
2. Where, therefore, upon a special finding by the jury, amounting to an acquittal, the chairman directs a verdict of guilty to be entered, the Court of K. B. will not grant a mandamus requiring the minute of the verdict to be altered according to the fact. *Ibid.*
3. The only course open to the prisoner is to apply to the crown for a pardon. *Ibid.*
4. Where an appeal to the quarter sessions is given by a statute against any conviction under it, to any person aggrieved by such conviction, provided he give to the respondent a notice in writing of such appeal, and of the cause and matter thereof, and the court of quarter sessions are directed to hear and determine the matter of the appeal, that Court can adjudicate only on the matter stated in the notice. *Rex v. Boulton.* 496
5. And therefore where, in the appellant's notice, grounds of appeal relating to the *merits* only are

## SETTLEMENT.

stated, the sessions cannot quash the conviction for defect of form.  
*Rex v. Boulbee.* 496

## SETTLEMENT.

### *By renting &c. a Tenement.*

1. No settlement can be gained since the passing of 1 *Will.* 4, c. 18, by the renting and occupation of a tenement, by a party who allows an undertenant to have the exclusive occupation of rooms in the tenement, for however short a period such occupation may continue, and however small may be the sum paid in consideration of it.  
*Rex v. Inhabitants of St. Nicholas, Colchester.* 1
2. *Semble*, that a letting of rooms by an innkeeper to his guests, is not such an underletting as would defeat the settlement. *Ibid.*
3. Where a party rents and occupies for a year a tenement in A., at the yearly rent of 10*l.*, and before payment of the full rent is removed to B., by an order which is not appealed against, or which is confirmed on appeal, he may, by a subsequent payment of the remainder of the rent, acquire a settlement in A., under 6 *Geo.* 4, c. 57 and 1 *Will.* 4, c. 18. *Rex v. Inhabitants of Willoughby.* 325
4. The forty days' residence required under this head of settlement, must be within the year of occupation; but at what period of the year it takes place is immaterial. *Ibid.*
5. A settlement may be gained under 1 *Will.* 4, c. 18, by a party hiring a house and residing in it for a year, notwithstanding that he is in the habit of taking in persons to sleep in some of the rooms,—sometimes letting a bed and sometimes half a bed,—generally by the night only, but occasionally by the week,—such persons having no right to the

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rooms during the day, and he retaining the keys of all the rooms and having constant access to and control over the whole house.  
*Rex v. Inhabitants of St. Giles in the Fields.* 476

### *Exclusive Occupation of Tenement under 1 Will. 4, c. 18.*

6. Where the hirer of a tenement, consisting of a house and land, sells the growing crops before the expiration of the year, and retains possession of the house only, he is not the occupier of the tenement during the whole of the year, so as to gain a settlement under 1 *Will.* 4, c. 18. *Rex v. Inhabitants of Pakefield.* 488
7. A., hiring a house in the parish of Dale, before the end of the year leaves the parish, with his goods and with that part of his family who resided with him. A son of A., who had previously resided with A., by the direction of A. sleeps in the house till the end of the year, boarding with his master in another part of the parish. This is not a continuance of occupation in A. for the purpose of gaining a settlement. *Ibid.*
8. So, although A. leaves in the house a portion of his goods, which cannot be conveniently removed. *Ibid.*
9. Payment of rent by a trustee, out of the produce of effects assigned to him by the tenant, in trust for the payment of the rent and taxes, and other charges and expenses in respect of the land occupied by the tenant, and of debts, is not a payment by the tenant within 1 *Will.* 4, c. 18, for the purpose of gaining a settlement. *Ibid.*

### *By Estate.*

10. A. being with B., C., and D., next of kin to an intestate, takes out

administration, and then all four join in a mortgage of a leasehold tenement, in the parish of Dale, formerly the property of the intestate, and divide between them the money advanced. Subsequently *B.*, in consideration of a sum of money then paid, verbally agrees with *C.* to sell him all his interest in the tenement, and after a lapse of some time joins *A.* and *D.* in releasing all their interest to *C.* Held, that *B.* did not, by a residence in Dale for forty days between making the agreement and executing the release, gain a settlement by estate in that parish.

*Rex v. Inhabitants of Cregrina.* 455

11. Under a devise of land in Dale to trustees, upon trust to sell and pay debts and legacies, and to pay the residue, if any, to *A.*,—*A.* has an equitable estate in Dale, from which he is irremovable, and in respect of which, by forty days' residence in the parish, he gains a settlement in Dale, whether the residuary interest be or be not of any value. Any inquiry therefore into the state of the accounts and the solvency of the estate, is irrelevant to the question as to *A.*'s settlement in Dale. *Rex v. Inhabitants of Aslackby,* 699

#### By Birth.

12. A *prima facie* case of settlement by evidence of the place of birth of the pauper, may be answered by proof of the maiden settlement of his mother, without shewing that his father had no settlement. *Rex v. Inhabitants of St. Mary, Leicester.* 241

#### By Apprenticeship.

13. The true test whether an agreement is a contract of hiring and service or a contract of appren-

ticeship, is the apparent object of the parties; and if that object be for the one party to teach and the other to learn, the agreement is a contract of apprenticeship. *Rex v. Inhabitants of Great Wiskford.* 367

14. It is not necessary that the precise words "teach" or "learn," should occur in the agreement, to constitute it a contract of apprenticeship. *Ibid.*
15. The trustees of a charity bound out an apprentice to *R.*: the consideration money expressed in the indenture was 10*l.* paid by the trustees: previously to the execution of the indenture the apprentice's grandfather, *who was no party to the indenture*, had agreed with the mistress that the premium should be 25*l.*; and subsequently to the execution the grandfather paid to the mistress 15*l.* Of the contract, or of the payment of any sum beyond the 10*l.*, the trustees were entirely ignorant. Held, that the agreement by the grandfather to pay the additional sum of 15*l.* was a binding agreement, and that therefore the indenture was void by 8 *Ann.* c. 9, s. 39, for not stating the full consideration. *Rex v. Inhabitants of Amersham.* 483
16. No settlement is acquired by service under an indenture of apprenticeship ordered, made and allowed under 56 *Geo.* 3, c. 139, unless the notice required by section 2 was duly given and was proved to the justices before allowance. *Rex v. Inhabitants of Whiston.* 514
17. But where an indenture, whereby the overseer of *A.* bound a pauper apprentice to a master in *B.*, under that statute, appears on the face of it to have been made in pursuance of an order of justices, and to have been allowed by them, it will

## SETTLEMENT.

be presumed, until the contrary be shewn, that such notice had been duly given and was proved to the magistrates before allowance. *Rex v. Inhabitants of Whiston.* 514

18. Under 43 *Eliz.*, c. 2, the overseers of a parish had authority, with the assent of two justices, to bind apprentice a child of parents legally settled and resident in and chargeable to such parish, although such child be at the time of executing the indenture resident elsewhere, and not a burthen upon the parish.

So, although the binding were to a master resident out of, and unconnected with the parish, the master's consent having been expressed by his execution of the indentures. *Rex v. Inhabitants of St. George, Exeter.* 208

### *By Hiring and Service.*

19. *A.* hires men from 5th April, 1816, to 5th April, 1817, to hew, work, fill, and drive coals, and to do such other work as shall be necessary for the carrying on of *A.*'s colliery, and as they shall be required and directed to do by *A.*; the men to receive 2s. 6d. for each day that they shall be laid idle (be unemployed) by *A.*, except on the pay-Saturdays, when the pit is going single shift (working twelve hours); but the pit going double shifts (working twenty-four hours), the men to work one shift, in order to make each shift work eleven days (*i. e.* in a fortnight), and, except when prevented by sickness or other unavoidable cause, to do and perform a full day's work on every working-day, except a single shift on the pay-Saturdays, and in default thereof, for every such default to pay 2s. 6d. to *A.*:—Held, that in this hiring there was an exception of pay-Saturdays and Sun-

## SETTLEMENT. 775

days, and that therefore no settlement was gained by service under such hiring. *Rex v. Inhabitants of Cowpen.* 673

20. A hiring under which the servant is to work ten hours a day, from five in the morning to six in the evening, and to leave off in the middle of the day on Saturdays, so as to make up the ten hours a day, is an exceptive hiring. *Rex v. Inhabitants of Norton-Bavant.* 88
21. By the regulations of a county bridewell, the keeper may appoint turnkeys, subject to the approbation and confirmation of the visiting justices; the keeper may suspend such turnkeys for disobedience or improper behaviour, but must make a report to the justices within three days, and must not make new permanent appointments until the visiting justices have made inquiry: the turnkey is to be paid by the county treasurer, but is to be in all other respects under the immediate orders and control of the keeper: any turnkey convicted of drunkenness, may be dismissed by the justices:—Held, that a turnkey appointed in pursuance of such regulations, and at an annual salary, is not a *servant* either to the justices or the keeper, so as to be able to acquire a settlement by hiring and service. *Rex v. Inhabitants of Sparsholt.* 479

### *By serving an Office.*

22. An office in a parish, to which the officer may be appointed for any discretionary period, is not an annual office within 3 & 4 *Will. & Mary*, c. 11, s. 6, and 9 & 10 *Will.* 3, c. 11. *Rex v. Inhabitants of Middlewich.* 182
23. Therefore, a man in fact appointed to and serving such office for a year, and residing within the parish,

cannot gain a settlement thereby.  
*Rex v. Inhabitants of Middlewich.*

182

24. Where in case of a general appointment to an office, such appointment will enure as an appointment for a year, the office is an annual office within those statutes.

*Ibid.*

25. No settlement is gained by the execution of an office (*e. g.* that of pinder,) for a town, to which the party is appointed at a court held within and for a manor, which manor does not extend over the whole town, and there being no special custom warranting such appointment. *Rex v. St. Mary, New-market.*

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26. A person inrolled as a member of a volunteer corps, is not *sui juris*, so as to be able to make a valid contract of service for a year. *Rex v. Inhabitants of Wilnesham.*

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27. A poor person legally settled in the parish of A., who having come into the parish of B. *animo morandi*, there meets with an accident, such as to make it dangerous actually to remove him, or even to take him before a justice to be examined as to his settlement, and becomes chargeable in consequence thereof, cannot be regarded as *casual poor*; and an order for his removal may be made and suspended under 35 *Geo.* 3, c. 101, s. 1 & 2. And such order being so made and suspended, the parish of A. is bound to pay to the officers of the parish of B. expenses incurred by them in curing and maintaining the pauper during the suspension of the order of removal. *Rex v. Oldland.*

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28. But if such poor person had not come into the parish of B., *animo morandi*, he would have come within the description of *casual poor*, and would not have been removable.

*Ibid.*

29. So, if the poor person (*e. g.* a foreigner) had no settlement elsewhere. *Seemle. Rex v. Oldland.*

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30. It is a sufficient statement of the ground of appeal against an order of removal, to say, that the party is settled in a particular parish, without specifying the species of settlement which the pauper has acquired. *Rex v. Justices of Cornwall.*

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*What a "Coming to Settle."*

31. In order to constitute a "coming to settle," within 13 & 14 *Car.* 2, c. 12, the party must have come into the parish *animo morandi* or *residendi*; but it is not necessary that he should have come with an intention to reside permanently. *Rex v. Inhabitants of Woolpit.*

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32. The residence intended need not be for such a period and under such circumstances as would at the time of passing of 13 & 14 *Car.* 2, c. 12, have conferred a settlement, — per *Patteson, J.* and *Williams, J.*

*Ibid.*

33. *Secus, seemle, per Coleridge, J.*

*Ibid.*

*And see infra, 12, 14.*

*What a Question of Fact to be decided by the Sessions.*

34. It is a question of fact for the sessions to determine, whether an agreement to serve is a contract of hiring or contract of apprenticeship. *Rex v. Inhabitants of Great Wishford.*

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35. Where, upon a case for the opinion of this Court, the sessions state the facts and draw their conclusion, this Court will not disturb the finding, unless it appear that the evidence was contrary to the finding, or that there was no evidence to support it. *Rex v. Inhabitants of Great Wishford.*

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36. Whether a party has come to settle within the meaning of 13 & 14 Car. 2, c. 12, is a question of fact to be decided by the sessions alone. *Rex v. Inhabitants of Woolpit.* 526
37. And where, upon a case stating the facts, the sessions find in the negative, this Court will not interfere with that finding, unless they see that upon the facts stated the finding is necessarily wrong. *Ibid.*
38. The sessions found that *A.* hired and paid for lodging for the pauper in Dale, that the pauper came to Dale, and resided in the lodgings for the week,—married,—and continued afterwards to reside in the lodgings, until his removal under the order appealed against: Held, per *Patteson, J.* and *Williams, J.*—dissent. *Coleridge, J.*—that a finding by the sessions that the pauper did not come to settle in Dale, within the meaning of 13 & 14 Car. 2, c. 2, was repugnant to the facts found, and was therefore necessarily wrong. *Ibid.*

## SEWERS-RATE.

*What Property ratable.*

1. All persons whose property derives any advantage from the works of the commissioners of sewers may be assessed to the sewers rate in respect of that property. *Soady v. Wilson.* 98
2. And property drained by sewers and drains originally made and always repaired by persons independent of the commissioners of sewers, and deriving no immediate benefit from the works of such commissioners, may be assessed by reason of the general benefit and advantage resulting from such property becoming thereby accessible, and of its approaching and neighbouring public ways being properly drained and cleansed. *Ibid.*

3. Held, that apartments in Somerset House, appropriated to the office of the commissioners for auditing the public accounts, are ratable by the commissioners of sewers for the city and liberty of Westminster and parts of Middlesex, although Somerset House is, by act of parliament, vested in the crown free from all incumbrances, for the purpose of establishing within the same that amongst other public offices. *Ibid.*
4. By 52 Geo. 3, c. 48, s. 7, all persons are liable to be rated to the sewers-rate, as occupiers of premises ratable thereto, who are *de facto* rated, in respect of such premises, to the *poor-rates* of the parishes to which that act applies. *Ibid.*

## STAMP.

1. The proviso in 37 Geo. 3, c. 111, exempting from the stamp duties thereby imposed, every indenture of apprenticeship "where a *sum or value not exceeding 10l.* shall be given or contracted with or in relation to the apprentice," does not extend to an indenture where *no* consideration passes. *Rex v. The Inhabitants of the Parish of Mabe, Cornwall.* 159

*Apprentice, Transfer of.*

2. *A.* is apprenticed to *B.*, who was a tinman, by the trustees of a charitable fund, and the premium paid out of that fund. *A.* serves *B.* three and a half years; at the end of which time *B.*, at *A.*'s request, verbally, and without the knowledge of the trustees, consents that *A.* shall serve the remainder of his time with *C.*, a plumber, and agrees to give to *C.* 6*l.* "as part of the 15*l.* paid as a premium on the binding of *A.*," for taking him:—Held, that the 6*l.* was a

valuable consideration paid to C., "other than was given by any parish or township, or any public charity," and that therefore the transfer of A. to C. was void for want of a stamped assignment under 55 Geo. 3, c. 184, sched. 1, Apprenticeship. *Res v. Inhabitants of Fakenham.* 50

### STATUTE DUTY.

*See* HIGHWAY.

### SURVEYOR OF HIGHWAYS.

Churchwardens and overseers have not such a property in the account books of a late surveyor of the highways as to enable them to maintain trover for them, and their remedy is under the stat. 13 Geo. 3, c. 78, s. 48. A late surveyor of highways, on his account books being demanded of him at the vestry, said, "I have not got them, I have delivered them to my brother J.," and his brother J. in his presence said, "I have them, and I will keep them." J. was one of the overseers of the poor of the parish:—Held, in an action of trover against A., that this was no evidence of a conversion by A., as the overseer is a person to whom the books are to be delivered under the stat. 13 Geo. 3, c. 78, s. 48, and the judge will not leave it to the jury to say whether this delivery over was colourable only. *Addison and others v. Round.* 428

### TITHES.

*See* RATES, 2, 3.

### VENUE.

If a felony be committed in that part of the county of a town which has been added to it by the Boundary

### WAGES.

Act, 2 & 3 Will. 4, c. 64, and the Municipal Reform Act, 5 & 6 Will. 4, c. 76, it is triable in the county of the town. *Res v. Piller.* 439

### VESTRY.

1. The trustees appointed and acting under a local act of parliament for building a church, which authorizes them to levy rates upon the inhabitants of the parish, and directs that the accounts shall be audited and allowed by the quarter sessions, are, nevertheless, compellable, under sect. 34 of the General Vestry Act (1 & 2 Will. 4, c. 60,) to produce and explain their accounts before the auditors of the parish accounts, appointed under, and in consequence of the adoption of, the last-mentioned act. *Res v. Trustees of St. Pancras New Church.* 245
2. *Semble*, that all Boards, &c. having power to levy rates on the inhabitants of a parish which adopts the General Vestry Act, are compellable to produce and explain their accounts before the auditors. *Ibid.*
3. A mandamus to appear, and produce and explain accounts to auditors, cannot direct the parties to appear, &c. "at such time and place as the auditors may appoint and give notice thereof," where by statute the parties are only required to appear at a meeting directed to be held at a certain place. *Ibid.*
4. Auditors of parish-accounts, appointed under that act, can hold meetings only in the board-room of the vestry. *Ibid.*

### WAGES.

*See* JUSTICES.

## WOUNDING.

### WOUNDING.

1. Gamekeepers being in a preserve between twelve and one at night, heard the firing of two guns, and proceeding in the direction of the sound, met with two persons, who neither had guns nor game upon them, nor were either found near them. The gamekeepers immediately seized them, without calling on them to surrender, or in any way notifying to them who they were. The keepers were wounded, one of them seriously:—Held, that the prisoner who wounded them might, under the circumstances, and taking into consideration the situation and the time of the night, &c. be properly convicted under

## WOUNDING. 779

the stat. 9 Geo. 4, c. 31, ss. 11 &

12. *Rex v. Taylor and Penwright.*

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2. If a police constable, on being sent for at a late hour of the night to clear a beer-house, do so, and one of the persons on leaving the house, and being told to go away, refuse to do so, and use threatening language, the police constable is justified in laying hands on him to remove him; and if he cut the police constable with a knife, with intent to do grievous bodily harm, this is a capital offence; and the fact of the police constable having laid hands on the party, would not have reduced the crime to manslaughter, if death had ensued. *Rex v. Thomas Hems.* 433













